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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1998

SHAWKI R. IBRAHIM

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF HEALTH

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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July 14, 1999

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Kumho Tire Co., Ltd.* v. *Carmichael*, 119 S. Ct. 1167 (1999) -- which holds that it is the province of the trial judge to determine the admissibility of technical or specialized expert testimony, with any such determination reviewable only for abuse of discretion -- requires reversal of the court of appeals *de novo* determination that the trial court improperly admitted technical expert evidence under Federal Rule of Evidence 702?

2. Whether the discretion accorded trial courts to award damages to a victim of employment discrimination under 42 U.S.C. § 2000e-5(g) permits an award of damages to compensate the victim for the increased tax liability associated with the lump sum payment of damages for back pay?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS AND FEDERAL RULES AT ISSUE 2

STATEMENT OF THE CASE 3

Preliminary Statement 3

Factual and Procedural Background 5

First Trial and Appeal 6

The Trial on Damages and Subsequent Hearing on Negative Tax Impact 7

The Expert Testimony 8

The District Court's Decision . . . 9

The Second Appeal 10

Argument 12

I. ***CERTIORARI* SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *KUMHO*, BY EXAMINING *DE NOVO* THE ADMISSIBILITY OF A TECHNICAL EXPERT'S TESTIMONY** . . . 12

A. The Question is a Substantial and Important One 12

B. The Court of Appeals' Decision Violates the Rule Subsequently Established in *Kumho* 14

II. **CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS RULING DIRECTLY CONFLICTS WITH RULINGS FROM THE DISTRICT OF COLUMBIA, THIRD, SIXTH AND TENTH CIRCUITS** 16

A. The Question is a Substantial and Important One 16

B. The Court of Appeals Ruling is in Direct Conflict with Decisions of Other Courts of Appeals 18

Conclusion 22

TABLE OF AUTHORITIES

CASES

Page(s)

Albermarle v. *Moody*, 422 U.S. 405 (1975) 17, 19

City of Bridgeport, Connecticut v. *Bridgeport Coalition for Fair Representation*, 512 U.S. 1283 (1994) . 16

Dashnaw v. *Pena*, 12 F.3d 1112 (D.C. Cir. 1994) 20

Daubert v. *Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) 13

EEOC v. *Kentucky State Police Department.*, 80 F.3d 1086 (6th Cir. 1996) 20-21

Ford Motor Company v. *EEOC*, 458 U.S. 219 (1982) .. 17

Gelof v. *Papineau*, 829 F.2d 452 (3d Cir. 1987) 20

General Electric Co. v. *Joiner*, 522 U.S. 136 (1997) 12, 13

Ibrahim v. *New York State Dep't of Health*, 904 F.2d 161 (2d Cir. 1990) 7

Kumho Tire Co., Ltd. v. *Carmichael*, 119 S. Ct. 1167 (1999) ..... *passim*

Local 28 of the Sheet Metal Workers' Int'l Assoc. v. *EEOC*, 478 U.S. 421 (1986) 18-19

Lords Landing Village Condominium Council v. *Continental Ins. Co.*, 520 U.S. 893 (1997) 16

Sears v. *Atchison, Topeka & Santa Fe Railway Co.*, 749 F.2d 1451 (10th Cir. 1984) 19

Teamsters v. *United States*, 431 U.S. 324 (1976) 19

STATUTES

42 U.S.C. § 2000e-5(g)(1) (1994) ..... *passim*

29 U.S.C. § 626(b) (1994) 20

RULES

Fed. R. Evid. 102 13

Fed. R. Evid. 702 ..... 3, 4, 13

PETITION FOR A WRIT OF CERTIORARI

Shawki R. Ibrahim respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals upholding in part and vacating in part Mr. Ibrahim's damages award is not officially reported. App. 1a. The disposition, however, appears at 173 F.3d 844 (Table). The opinion and judgment of the district court awarding Mr. Ibrahim damages is not officially reported. App. 4a.

The opinion of the court of appeals reversing the judgment of the district court and remanding the case for a determination on damages is reported at 904 F.2d 161. App. 38a. The opinion of the district court denying Mr. Ibrahim's motion for judgment notwithstanding the verdict and motion for a new trial is not officially reported, but is unofficially reported as 1989 WL 35926. App. 55a. The opinion of the district court denying Mr. Ibrahim's motion to amend his complaint and denying the motion of the New York State Department of Health (the "Department") to amend its answer is reported at 692 F. Supp. 1471. App. 58a. The opinion of the district court granting partial summary judgment for the Department is reported at 581 F. Supp. 228. App. 63a.

JURISDICTION

On March 4, 1999, the court of appeals entered judgment affirming in part and vacating in part the judgment of the district court. App. 1a. The court of appeals denied Mr. Ibrahim's petition for rehearing on April 15, 1999. App. 76a. This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULES AT ISSUE

This case involves 42 U.S.C § 2000e-5(g)(1) and Federal Rule of Evidence 702. The text of these provisions is as follows:

42 U.S.C. § 2000e-5(g)

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

FED. R. EVID. 702

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

Preliminary Statement

This case presents two narrowly-drawn issues for review. The first is whether a court of appeals may review, *de novo*, a trial judge's determination as to the admissibility of highly technical evidence given by an expert witness. This Court expressly ruled that it may not in *Kumho Tire Co, Ltd.* v. *Carmichael*, 119 S. Ct. 1167 (1999), a decision issued 19 days *after* the court of appeals' decision in this case. In *Kumho*, this Court held that it is the province of the trial judge to determine the reliability and relevance of technical or highly specialized testimony given by an expert witness, pursuant to Federal Rule of Evidence 702, and that the trial judge's

admissibility determination is reviewable only for abuse of discretion.

Contrary to this Court's ruling in *Kumho*, the court of appeals in this case reviewed *de novo* the district court's decision as to the admissibility of expert testimony. The district court (Dearie, D.J.) allowed Mr. Harvey Kelly, a certified public accountant and partner with Price Waterhouse LLP, to testify as an expert witness as to a variety of complex tax and damages calculations -- including the amount required to compensate Mr. Ibrahim for the increased tax liability resulting from his receipt of a damages award in a lump sum rather than as wages and interest earned during the period of discrimination. The district court, after probing Mr. Kelly's credentials and conclusions, found the expert testimony reliable and relevant, and adopted Mr. Kelly's findings that Mr. Ibrahim was entitled to damages to compensate him for the negative tax impact arising from his receipt of a lump sum payment.

The court of appeals, rather than deferring to the lower court's Rule 702 determination, as is required in *Kumho*, substituted its judgment for that of the district court, and vacated that portion of the damages award attributable to the negative tax impact. The court did so based on its own finding that the expert's assumptions were mutually incompatible. That ruling, and the court's analysis, are contrary to *Kumho* and, we respectfully submit, merit the attention of this Court.

At a minimum, the judgment of the court of appeals should be vacated and the case remanded for

reconsideration in light of this Court's subsequent decision in *Kumho*.

The second issue that merits consideration by this Court is whether Title VII of the Civil Rights Act of 1964 permits an award of damages to compensate a victim of discrimination for the increased tax liability incurred as a result of having the damages paid in a lump sum rather than as wages paid during the period of discrimination. The District of Columbia, Third, Sixth, and Tenth Circuit Courts of Appeals have addressed this issue and reached inconsistent results. The court of appeals decision provides this Court an opportunity to resolve this conflict.

Factual and Procedural Background

Mr. Shawki R. Ibrahim began working for the New York State Department of Health Systems Management, Finance Division, in February 1976 as a senior medical facilities auditor. App. 19a. At the time, Mr. Ibrahim was 54 years old. App. 64. In November 1977, Mr. Ibrahim provisionally was promoted to a grade 23 position. App. 19a. He subsequently passed a civil service exam and was promoted permanently to a grade 23 position in June 1978. *Id.* Later that year, Mr. Ibrahim took and passed an open competitive service exam for a position in the Bureau of Audit, a grade 27 position. *Id.* Because no openings existed in the Bureau of Audit, Mr. Ibrahim was placed on an eligibility list along with twelve other candidates for a similar grade 27 position as a principal health care fiscal analyst ("PHCFA") in the Reimbursement Bureau. *Id.*

Of the thirteen persons eligible for PHCFA positions, seven were appointed and an additional four declined, leaving Mr. Ibrahim and another candidate as the only eligible candidates not appointed. *Id.* Subsequently, the Director of the Reimbursement Bureau promoted the other candidate to a provisional position as a PHCFA without an interview or having requested the position. App. 19a-20a; 43a. Thus, of the 13 candidates eligible for a grade 27 position, only Mr. Ibrahim was not appointed. App. 20a.

First Trial and Appeal

On January 25, 1982, Mr. Ibrahim filed suit in the United States District Court for the Eastern District of New York against the Department asserting claims under Title VII for discrimination based on national origin and under the Age Discrimination in Employment Act (the "ADEA").[1/] *Id.* The district court conducted a bench trial on the Title VII claim and a jury trial on the ADEA claim. App. 20a-21a. The district court, although finding that the Department's proffered reasons for not appointing Mr. Ibrahim to a grade 27 position were pretextual and that Mr. Ibrahim had been the victim of cronyism and favoritism, nevertheless concluded that the Department's actions did not violate Title VII. *Id.* The jury also found in favor of the Department on the ADEA claim. *Id.* The district court denied Mr. Ibrahim's motion for judgment notwithstanding the verdict with respect to the ADEA claim. *Id.*

1/ The district court obtained subject matter jurisdiction pursuant to 42 U.S.C. §§ 1331 and 1343.

On appeal, the Second Circuit reversed the district court judgment, ruling that Mr. Ibrahim's proof of pretext entitled him to prevail on his Title VII claim. *See Ibrahim* v. *New York State Dep't of Health*, 904 F.2d 161, 168 (2d Cir. 1990); App. 54a. The court of appeals remanded the case for a trial on damages. *Id.*

The Trial on Damages and Subsequent Hearing on Negative Tax Impact

The district court conducted a two-day damages trial on April 12 and 13, 1993. App. 4a. By memorandum and order dated January 20, 1995, the district court determined that, pursuant to 42 U.S.C. § 2000e-5(g)(1), Mr. Ibrahim was entitled to recover back pay in an amount representing the difference in salary between a grade 27 position and a grade 23 position for the period between February 1979 and September 1990. App. 21a-34a. The court also found that Mr. Ibrahim was entitled to prejudgment interest on the back pay award, reasonable attorney's and expert fees, and compensation for vacation and personal days he devoted to prosecuting his lawsuit. App. 34a, 37a. Because Mr Ibrahim would have been placed in a higher tax bracket as a result of having his damages paid to him in a lump sum, the district court also ruled that Mr. Ibrahim was entitled to recover the amount of the increased tax liability resulting from the payment of his damages in a lump sum rather than over the time period during which he had been discriminated against. App. 35a-36a.

The Expert Testimony

On November 10, 1997, the district court conducted a hearing on the amount of damages to be awarded to Mr. Ibrahim as a result of the negative tax impact. App. 100a. At that hearing, plaintiff's expert, Mr. Harvey Kelly, a certified public accountant and partner at Price Waterhouse, testified as to the amount of damages to which Mr. Ibrahim was entitled. App. 100a, 143a, 151a-52a. As part of his presentation, Mr. Kelly prepared a detailed report analyzing the amount of damages to which Mr. Ibrahim was entitled on account of the negative tax impact. App. 106a-133a.

Mr. Kelly concluded initially that Mr. Ibrahim was entitled to $289,092 in back pay and interest. App. 112a; App. 224a-225a. Applying several analyses, Mr. Kelly concluded, based on that calculation, that Mr. Ibrahim was entitled to $303,862 in damages on account of the negative tax impact. App. 224a-225a. Of this amount, $28,228 was attributable to the negative tax impact associated with Mr. Ibrahim's back pay award, $4,335 attributable to the negative tax impact associated with vacation, personal and sick days, and $271,299 attributable to the negative tax impact on the prejudgment interest award. App. 112a; App. 224a-225a. In his report, Mr. Kelly explained that, had the entire damages award not been paid to Mr. Ibrahim in a lump sum, Mr. Ibrahim would have owed $36,875 in taxes on wages, $5,662 in taxes on vacation, personal and sick days, and no taxes on interest on under-compensated wages. App. 224a-225a.

At the November 10, 1997 hearing, the district court questioned Mr. Kelly as to how he calculated the

amount of the tax impact on the prejudgment interest award and how he arrived at his conclusion that Mr. Ibrahim would have incurred no tax liability on his prejudgment interest award. App. 125a. Mr. Kelly explained that, based on his examination of Mr. Ibrahim's tax returns from 1979 through 1990, Mr. Ibrahim's receipt of the lump sum payment attributable to prejudgment interest caused him to be placed in the 39 percent tax bracket for federal income tax purposes; Mr. Ibrahim would have paid taxes at a significantly lower rate had he been paid wages between 1979 and 1990 at a non-discriminatory level. App. 114a. Mr. Kelly further testified that Mr. Ibrahim would not have been taxed on interest on those wages based on his then-existing financial situation. App. 125a-27a.

The Department objected to Mr. Kelly's analysis, maintaining that any amount paid to Mr. Ibrahim for negative tax impact "would in effect be a windfall to plaintiff and essentially a payment by the State of Mr. Ibrahim's tax obligations." App.9a. The Department, although it cross-examined Mr. Kelly at the November 10 hearing, did not call any experts to testify as to the appropriate amount of Mr. Ibrahim's damages.

The District Court's Decision

By memorandum and order dated February 24, 1998, the district court ruled that an award for negative tax impact was appropriate. App. 8a. The court reasoned:

> [T]he damages award in a discrimination case must, to the extent feasible, place the victim in the position he would have been in had the proscribed

> conduct not occurred. . . . Adjustments or add-ons to defray the negative tax impact of a lump sum payment, including interest, are designed to accomplish that remedial goal. Mr. Ibrahim's award will not in effect include the taxes due on the award, but only such an amount that will fill the gap between the higher taxes he will pay and the lesser . . . amount he would have paid to taxing authorities on a yearly basis.

App. 9a. The court directed the parties to settle judgment. *Id.*

Mr. Ibrahim and the Department each submitted proposed judgment orders. App. 80a, 93a. The district court adopted, in its entirety, the Department's proposed judgment, which awarded damages to Mr. Ibrahim for lost back pay, interest on the lost back pay, personal days devoted to the litigation, reasonable attorney's fees and negative tax impact. App. 4a.

Mr. Ibrahim appealed the district court's determination of damages. App. 78a. The Department cross-appealed, claiming, among other things, that Title VII did not permit recovery of damages based on negative tax impact.

The Second Appeal

The Second Circuit, in a summary opinion issued March 4, 1999, affirmed the district court judgment in all respects, except for the portion of the award attributable to negative tax impact. In its opinion, the court of appeals independently examined the reliability of Mr. Kelly's

expert testimony as to the determination of prejudgment interest. The court of appeals stated that:

> Charts prepared by plaintiff's expert [Mr. Kelly] showed that plaintiff would have earned interest on his earnings at a taxable rate, but then would have incurred no taxes on that interest. These assumptions were mutually incompatible: either the figure for interest foregone was vastly overstated, because it was calculated based on a taxable interest rate, or the assumption of zero taxes was indefensible, because taxes would have been paid.

App. 3a.

Although the court of appeals found that the $213,624.11 award to Mr. Ibrahim as prejudgment interest was overstated, it did not modify, vacate or remand for redetermination the portion of the award attributable to prejudgment interest. Instead, the court vacated in their entirety all damages awarded by the district court attributable to the negative tax impact -- totaling $247,224.00. *Id.* The court of appeals did not remand the matter to the trial court to determine the relationship between prejudgment interest and negative tax impact.

On March 18, 1999, Mr. Ibrahim petitioned the court of appeals for rehearing. The petition was denied summarily on April 15, 1999. App. 76a.

Argument

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *KUMHO*, BY EXAMINING *DE NOVO* THE ADMISSIBILITY OF TECHNICAL EXPERT TESTIMONY

A. The Question is a Substantial and Important One

The question as to whether the court of appeals erred when it reviewed the trial judge's decision to admit technical and specialized expert testimony *de novo* is substantial and important, as evidenced by this Court's recent opinion in *Kumho*.

In *Kumho*, this Court ruled that it is the province of the trial judge to determine the admissibility of testimony provided by an expert with technical or specialized knowledge. The trial judge's admissibility determination is reviewable only for abuse of discretion. *See Kumho Tire Co. v. Carmichael,* 199 S. Ct. 1167, 1176 (1999); *General Electric Co.* v. *Joiner*, 522 U.S. 136, 142-43 (1997).

As this Court explained in *Kumho*, the Federal Rules of Evidence "grant expert witnesses testimonial latitude unavailable to other witnesses. . . ." *Kumho*, 119 S. Ct. at 1174. The trial judge is the "gatekeeper" of technical expert testimony and is responsible for determining the reliability and relevance of such evidence. The Court noted that, without such responsibility,

> the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.

Kumho, 199 S. Ct. at 1176. Thus, consistent with the goal of seeking to avoid "unjustifiable expense, and delay," Fed. R. Evid. 102, this Court ruled that trial court judges must be accorded broad latitude to determine the admissibility of expert witness testimony, with such determinations reviewable only for an abuse of that discretion. *See Kumho*, 199 S. Ct. at 1176.

The issue of the appropriate standard of review governing the admissibility of expert testimony under Rule 702 recently has merited the attention of this Court in two other cases. In *Daubert* v. *Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), this Court granted certiorari to determine whether the Rule 702 standard governing the admissibility of scientific testimony had displaced the common law test. In *General Electric Co.* v. *Joiner*, 522 U.S. 136 (1997), this Court granted certiorari to determine the standard of review applicable to a trial court's determination as to the admissibility of scientific expert witness testimony.

We respectfully submit that the question of whether the court of appeals erred by reviewing, *de novo*, highly technical and specialized testimony of plaintiff's expert merits the attention of this Court.

B. The Court of Appeals' Decision Violates the Rule Subsequently Established in *Kumho*

The court of appeals' ruling directly conflicts with this Court's decision in *Kumho*, which was issued 19 days *after* the court of appeals issued its opinion. Contrary to this Court's direction in *Kumho* that a trial judge be accorded broad discretion to assess the admissibility of technical expert testimony, the court of appeals engaged in a *de novo* review of Mr. Kelly's testimony, concluding that his "assumptions were mutually incompatible." The inquiry made by the court of appeals is precisely the type that this Court held in *Kumho* should not be made.

Mr. Kelly's expert testimony was highly technical and involved the interconnections among several disciplines; as such, this Court's holding in *Kumho* clearly applies. At the November 10, 1997 hearing, the district court properly discharged its "gatekeeping" function by undertaking rigorous examination of the reliability of the various analyses Mr. Kelly had utilized in reaching his conclusions as to the correct amount of damages Mr. Ibrahim had incurred by dint of the Department's discrimination. Appropriately, the district judge extensively questioned the expert, inquired into Mr. Kelly's qualifications, methodologies and data, and permitted vigorous cross-examination. It was only after engaging in this process that the district court determined that Mr. Kelly's testimony was reliable and should be admitted.

That determination, under *Kumho*, should have been reviewed only for "an abuse of discretion." *Kumho*, 119 S. Ct. at 1171. The court of appeals, however,

reviewed the district court's admissibility determination *de novo* and ruled that the testimony should not have been admitted.

The court of appeals decision demonstrates why trial courts must be accorded broad latitude to assess the reliability, and rule on the admissibility of highly technical expert witness testimony. The court of appeals, while noting an apparent "internal inconsistency" between the evidence supporting the expert's determination of negative tax impact and the calculation of the prejudgment interest rate, did not explain the link between prejudgment interest and negative tax impact, did not address why the judgment for negative tax impact should be vacated if Mr. Ibrahim had been overcompensated on his prejudgment interest award, and did not explain why Mr. Ibrahim's entire negative tax impact award should be vacated when he was purportedly overcompensated only on the portion attributable to prejudgment interest. Nor did the court of appeals remand the case to the district court for further findings on the issue of damages. By examining the reliability of Mr. Kelly's testimony *de novo*, the court of appeals improperly arrogated to itself the district court's role as "gatekeeper" of expert evidence.

Concededly, the court of appeals did not have the benefit of this Court's *Kumho* decision at the time it issued its ruling; prior to *Kumho*, the standard of review to be applied by courts of appeals on the admissibility of technical expert testimony was ambiguous. Accordingly, we respectfully submit that this Court should grant certiorari, vacate the court of appeals' judgment, and

remand the case for further consideration in light of this Court's decision in *Kumho*.[2/]

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS RULING CONFLICTS WITH RULINGS FROM OTHER CIRCUITS

A. The Question is a Substantial and Important One

The question of whether Title VII authorizes damages attributable to negative tax impact is a substantial and important one not only because of its salutary implications for victims of employment discrimination, but also because of the message it would send employers.

2/ *See Lords Landing Village Condominium Council* v. *Continental Ins. Co.*, 520 U.S. 893, 896 (1997) ("Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order [to vacate and remand] is . . . potentially appropriate.") *quoting Lawrence* v. *Chater*, 516 U.S. 163 (1996). *See, e.g., City of Bridgeport, Connecticut* v. *Bridgeport Coalition for Fair Representation*, 512 U.S. 1283 (1994) (granting certiorari, vacating the judgments below and remanding case to lower court for further consideration in light of intervening Supreme Court decision).

This Court previously has ruled that it is of crucial importance to the overall purposes of Title VII that back pay awards be adequately crafted so as to place victims of employment discrimination, through an award of damages, in circumstances as close as possible to those they would have found themselves in absent discrimination, thereby discouraging discriminatory employment practices:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that provides the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.

Albermarle v. Moody, 422 U.S. 405, 417-18 (1975) (internal citation and quotes omitted); *see also Ford Motor Company v. EEOC*, 458 U.S. 219, 230 (1982).

If the objectives articulated by Congress in promulgating Title VII, and by this Court in interpreting that legislation, are to be realized, damages attributable to the negative tax impact associated with lump sum payments must be made available to victims of employment discrimination. Mr. Kelly explained the practical implication of the negative tax impact: individuals in the upper tax bracket are taxed at a federal rate of 39 percent; when state and local tax obligations are included, a victim of employment discrimination whose award is paid in a lump sum may be required to pay taxes of 50

percent or higher on that award. App. 114a. Insofar as the vast majority of these victims, including Mr. Ibrahim here, would pay taxes at considerably lower rates (even taking into account that they would have been paid a higher salary but for the employment discrimination), the economic justification for the negative tax impact becomes apparent. Ironically, the economic consequence is greatest for those most desperately in need of the protections of Title VII.

We respectfully submit that the question of whether Title VII permits damages to be awarded to take into account the negative tax impact merits the attention of this Court.

B. The Court of Appeals Ruling is in Direct Conflict with Decisions of Other Courts of Appeals

A district court has broad discretion under Title VII to craft appropriate damages awards once an unlawful employment practice has been found.[3/] This Court repeatedly has held that a district court may craft a damages award to make an individual victim of discrimination whole. *See Local 28 of the Sheet Metal*

[3/] A court that finds an employer has intentionally engaged in an unlawful employment practice not only may enjoin the employer from engaging in such unlawful practice, but also may, among other forms of relief, direct reinstatement of the employee, award back pay to the employee and order "any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1) (1994).

Workers' Int'l Assoc. v. *EEOC*, 478 U.S. 421, 423 (1986); *Teamsters* v. *United States*, 431 U.S. 324, 364 (1976); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975).

Applying these principles, the Tenth Circuit Court of Appeals ruled that Title VII, specifically 42 U.S.C. § 2000e-5(g)(1), permits damages to take into account the negative tax impact. Thus, in *Sears* v. *Atchison, Topeka & Santa Fe Railway Co.*, 749 F.2d 1451 (10th Cir. 1984), cert. denied sub. nom. *United Transp. Union v. Sears*, 471 U.S. 1099 (1985), the Tenth Circuit ruled that a district court may include in its back pay award a tax component to compensate employment discrimination victims who received their award in one lump sum. The court reasoned that such damages are particularly appropriate where a litigation has been protracted. See *id.* at 1456.

The Tenth Circuit's ruling in *Sears* directly conflicts with the Second Circuit's ruling here, which vacates the district court's award of damages to take into account the negative tax impact associated with Mr. Ibrahim's receipt, after 17 years of litigation, of back pay damages and interest in a lump sum.

Several other courts of appeals also recently have addressed, with widely varying results, whether damages for negative tax impact are appropriate in discrimination cases. The Third Circuit permitted, in an ADEA case, damages for negative tax liability, although the court did not reach the issue of whether such damages are allowable

in all discrimination suits. *See Gelof v. Papineau*, 829 F.2d 452, 455 n.2. (3d Cir. 1987).[4/]

The District of Columbia Circuit addressed the issue of whether the ADEA permits awards for negative tax impact in *Dashnaw* v. *Pena*, 12 F.3d 1112 (D.C. Cir. 1994). In that case, the court stated:

> Absent an arrangement by voluntary settlement of the parties, the general rule that victims of discrimination should be made whole does not support "gross-ups" of backpay to cover tax liability. We know of no authority for such relief . . . .

Id. at 1116.

The Sixth Circuit adopted a less cramped view of those damages available to compensate victims of discrimination. In *EEOC* v. *Kentucky State Police Department.*, 80 F.3d 1086 (6th Cir. 1996), the court ruled that the district court, in a case brought under the

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[4/] Damages under the ADEA are governed by 29 U.S.C. § 626(b) and provide for equitable relief similar to that authorized by 42 U.S.C. § 2000e-5(g). Liquidated damages may be awarded under the ADEA only for "willful violations"; upon a showing of such violations, the court may grant "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments . . . enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." 29 U.S.C. § 626(b) (1994).

ADEA, did not err by declining to deduct from plaintiffs' damages award those amounts plaintiffs would have owed for taxes. The court of appeals stated:

> backpay awards should not be reduced by the amount of income and social security taxes which would have been deducted from the wages the claimant would have received but for discrimination.

Id. at 1110, quoting Rasimas v. *Michigan Dep't of Mental Health*, 714 F.2d 614, 627 (6th Cir. 1983).

By vacating in its entirety the negative tax impact award directed by the district court, the Second Circuit unreasonably restricted Mr. Ibrahim's entitlement to damages. The court's decision directly conflicts not with the federal circuit court decisions that expressly permit such awards, but also this Court's precedent broadly interpreting the categories of damages available under 42 U.S.C.§ 2000e-5(g).

Accordingly, this Court should grant certiorari not only because the Second Circuit ruling directly conflicts with this Court's subsequently-issued decision in *Kumho*, but also to resolve the split among the circuits as to whether Title VII permits awards for negative tax impact.

CONCLUSION

For the foregoing reasons, we respectfully request that Mr. Ibrahim's petition for certiorari be granted.

Dated: July 14, 1999

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Shawki R. Ibrahim

Appendix

Index to Appendix

		Page
1)	Summary Order of the United States Court of Appeals for the Second Circuit dated March 4, 1999	1a
2)	Judgment of the United States District Court for the Eastern District of New York (Dearie, J.) dated April 15, 1998	4a
3)	Memorandum and Order of the United States District Court for the Eastern District of New York (Dearie, J.) dated Feb. 24, 1998	8a
4)	Memorandum and Order of the United States District Court for the Eastern District of New York (Dearie, J.) dated Dec. 13, 1996	11a
5)	Order of the United States District Court for the Eastern District of New York (Dearie, J.) dated June 17, 1996	14a
6)	Order of the United States District Court for the Eastern District of New York (Dearie, J.) dated June 1, 1995	16a
7)	Memorandum and Order of the United States District Court for the Eastern District of New York (Dearie, J.) dated Jan. 20, 1995	18a
8)	Opinion of the United States Court of Appeals for the Second Circuit dated May 25, 1990	38a

Index to Appendix (continued)

Page

9) Memorandum and Order of the United States District Court for the Eastern District of New York (Dearie, J.) dated April 6, 1989 . . . . . 55a

10) Memorandum and Order of the United States District Court for the Eastern District of New York (Dearie, J.) dated August 16, 1988 . . . . . 58a

11) Memorandum and Order of the United States District Court for the Eastern District of New York (McLaughlin, J.) dated Jan. 26, 1984 . . . 63a

12) Order of the United States Court of Appeals for the Second Circuit denying petition for rehearing dated April 15, 1999 . . . . . 76a

13) Notice of Appeal to the United States Court of Appeals for the Second Circuit dated May 12, 1998 . . . . . 78a

14) Draft Judgement of the United States District Court for the Eastern District of New York (Dearie, J.) dated April 14, 1998 . . . . . 80a

15) Defendant's Cross-Notice of Settlement dated April 14, 1998 . . . . . 84a

16) Affidavit of Charles M. Powell, Jr. dated April 14, 1998 . . . . . 86a

17) Affidavit of Charles F. Sanders dated April 9, 1998 . . . . . 90a

Index to Appendix (continued)

Page

18) Draft Judgement of the United States District Court for the Eastern District of New York (Dearie, J.) dated April 1998 . . . . . 93a

19) Affidavit of Teri Landin dated March 18, 1998 . 98a

20) Transcript of Hearing before the Honorable Raymond Dearie United States District Judge dated Nov. 10, 1997 . . . . . 100a

21) Report of Harvey R. Kelly dated June 25, 1997 143a

22) Transcript of Status Conference before the Honorable Raymond Dearie United States District Judge dated Feb. 14, 1997 . . . . . 226a

EDNY BKNY
82-cv-177
Judge Dearie

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR *RES JUDICATA*.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of March one thousand nine hundred and ninety-nine.

PRESENT:

Honorable Pierre N. Leval,
Honorable Rosemary S. Pooler,
Honorable Gerald W. Heaney,*
Circuit Judges.

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* The Honorable Gerald W. Heaney, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

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Shawki R. Ibrahim,

98-7709 (LEAD),
98-7740(X)

Plaintiff-Appellant-
Cross-Appellee,

v.

New York State Department of
Health,

Defendant-Appellee-
Cross-Appellant.

---------- x

APPEARING FOR APPELLANT: Charles M. Powell, Jr., New York, NY.

APPEARING FOR APPELLEE: Katharine Demgen, Assistant Attorney General, New York, NY.

Appeal from the United States District Court for the Eastern District of New York (Dearie, J.)

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED IN PART** and **VACATED IN PART**.

Plaintiff Ibrahim and defendant Department of Health both appeal from the judgment awarding damages to the plaintiff in his Title VII suit. The judgment included back pay, interest, and pay for personal days totaling

$309,994.11; compensation for the negative tax impact of that award totaling $247,224; and attorney's fees and costs.

We vacate the portion of the judgment attempting to compensate Ibrahim for the tax impact of a lump sum damages award. The evidence supporting this attempted adjustment was internally inconsistent and therefore fatally flawed. Charts prepared by plaintiff's expert showed that plaintiff would have earned interest on his earnings at a taxable rate, but then would have incurred no taxes on that interest. These assumptions were mutually incompatible: either the figure for interest foregone was vastly overstated, because it was calculated based on a taxable interest rate, or the assumption of zero taxes was indefensible, because taxes would have been paid. We therefore vacate the award for negative tax impact.

We have considered both parties' other contentions and find them to be without merit. Plaintiff's claims fail because they were waived by his failure timely to raise them below, or were properly addressed by Judge Dearie's thorough opinion of January 20, 1995, or are otherwise meritless. Defendant's contention that the liability judgment should be vacated was also waived by the failure to raise the issue below.

The portion of the judgment awarding $247,224 to compensate Ibrahim for the impact of the taxation of his award is hereby **VACATED**; in all other respects, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
CAROLYN CLARK CAMPBELL, CLERK

/s/ Lucille Carr
By: Lucille Carr, Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SHAWKI R. IBRAHIM,	:	
Plaintiff,	:	
-against-	:	**JUDGMENT**
NEW YORK STATE DEPARTMENT OF HEALTH, *et al.*,	:	82 Civ. 0177 (RJD)
Defendants.	:	

This action having come on for trial on remand from the United State Court of Appeals for the Second Circuit ("Second Circuit"), the Second Circuit having determined that the plaintiff's rights as guaranteed by Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"), had been violated by the defendant and, as a result of that determination, ordered the District Court to conduct a trial so as to afford plaintiff damages and equitable relief under Title VII; and a trial on damages, including expert testimony on behalf of plaintiff, having been held on April 12 and 13, 1993, the Hon. Raymond J. Dearie presiding; and the issue of damages having been tried, and a decision having been rendered on January 20, 1995; and the plaintiff having filed on September 14, 1995, a motion for a new trial pursuant to Fed. R. Civ. P. 59, and the Court having denied plaintiff's motion in all respects in a decision dated June 17, 1996; and the Court having issued a Memorandum and Order respecting damages on

December 13, 1996 wherein it provided the parties to this litigation with certain parameters with respect to back pay and the method of calculating interest on back pay; and the Court, upon application of the plaintiff, having conducted an additional post-trial hearing on damages on November 10, 1997 wherein the plaintiff presented the expert testimony of Harvey R. Kelly of Price Waterhouse, LLP and the Court having received the report of the expert as an exhibit; and the Court having issued a Memorandum and Order, on the issue of damages, dated February 24, 1998 wherein it ordered that the parties settle a judgment on notice; and the parties having conferred and exchanged mathematical calculations including the affidavits of Gordon Hamilton, sworn to on March 18, 1998 and April 2, 1998, respectively, and the exhibits annexed thereto, and Terri Landin, sworn to on March 18, 1998, and the exhibits annexed thereto, without being able to resolve certain mathematical differences.

IT IS ORDERED AND ADJUDGED, that plaintiff's motion for a new trial pursuant to Fed. R. Civ. P. 59 is denied in its entirety, and,

IT IS FURTHER ORDERED AND ADJUDGED, that plaintiff, SHAWKI IBRAHIM, recover of the defendant, NEW YORK STATE DEPARTMENT OF HEALTH, damages, in the form of back pay in the amount of Ninety-One Thousand One Hundred Forty Six ($91,146.00) dollars, together with interest, calculated pursuant to 26 U.S.C. § 6621, compounded annually through April 30, 1998, in the amount of Two Hundred Thirteen Thousand Six Hundred Twenty Four Dollars and Eleven Cents ($213,624.11), for a total sum of damages for undercompensated wages and interest in the amount of Three Hundred Four Thousand Seven Hundred Seventy Dollars and Eleven Cents ($304,770.11), and

IT IS FURTHER ORDERED AND ADJUDGED, that the plaintiff is entitled to receive compensation, for 25 personal days devoted by him to this litigation. The plaintiff shall, therefore recover from the defendant, for the 25 personal days in question, the sum of Five Thousand Two Hundred Twenty Four ($5,224.00) Dollars, and

IT IS FURTHER ORDERED AND ADJUDGED, that the plaintiff is entitled to, and shall recover of the defendant, the total amount of damages for undercompensated wages (back pay); interest on undercompensated wages and 25 personal days, damages in the amount of Three Hundred Nine Thousand Nine Hundred Ninety Four Dollars and Eleven Cents ($309,994.11).

IT IS FURTHER ORDERED AND ADJUDGED, that the plaintiff is entitled to, and shall recover of the defendant, compensation for the negative tax impact, or consequences associated with receiving the lump sum payment of $309,994.11, additional monetary damages in the amount of Two Hundred Forty Seven Thousand Two Hundred and Twenty Four Dollars ($247,224.00) and,

IT IS FURTHER ORDERED AND ADJUDGED, that each attorney who represented plaintiff, and formally appeared before this Court, during the course of this litigation, shall forward his application, if any, for payment of reasonable attorney fees, and reimbursement of out of pocket expenses, setting forth any and all moneys received from the plaintiff, SHAWKI IBRAHIM, for fees or reimbursements of disbursements, to the defendant NEW YORK STATE DEPARTMENT OF HEALTH'S Legal Counsel, in accordance with Section V(B) of the Eastern District's Civil Justice Expense and Delay Reduction Plan and the defendant, NEW YORK STATE DEPARTMENT OF

HEALTH, shall pay directly to plaintiff, SHAWKI IBRAHIM, after deducting from the fees expenses awarded to each applicant, an amount equal to that paid to each such applicant by plaintiff SHAWKI IBRAHIM, and

IT IS FURTHER ORDERED AND ADJUDGED, that plaintiff, SHAWKI IBRAHIM, shall forward his application to the Court for reimbursement of attorney fees for those attorneys who do not make application for reimbursement of services rendered in this litigation and costs and expenses incurred and expended by plaintiff during the course of this litigation with documented proof thereof and the defendant NEW YORK STATE DEPARTMENT OF HEALTH, shall pay directly to plaintiff that sum, relating to his application, as approved by the Court, and,

IT IS FURTHER ORDERED AND ADJUDGED, that the defendant NEW YORK STATE DEPARTMENT OF HEALTH, within sixty (60) days of its receipt of this duly entered judgment, shall pay to the plaintiff, SHAWKI IBRAHIM, total damages in the amount of Five Hundred Fifty Seven Thousand Two Hundred Eighteen Dollars and Eleven Cents ($557,218.11) as well as payment for plaintiff's legal fees and costs to be determined by this Court.

Dated: New York, New York
April 15, 1998

/s/ Raymond J. Dearie
RAYMOND J. DEARIE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

SHAWKI R. IBRAHIM,

Plaintiff, CV-82-177 (RJD)

-against- **MEMORANDUM & ORDER**

NEW YORK STATE DEPARTMENT OF HEALTH, *et al.*,

Defendants.

----------X

DEARIE, District Judge.

In this regrettably protracted litigation, the Court conducted a post-trial hearing on November 10, 1997 on plaintiff's application to reopen the record to take evidence related to issues of damages. Subsequently, plaintiff's expert witness on damages provided the Court with a supplemental report of his calculations which reflected certain court rulings made during the bearing and in earlier written opinions.

Putting aside for the moment certain minor inconsistencies between the proof and the conclusions drawn by plaintiff's expert, there remains only one issue of consequence that separates the parties. The lingering dispute involves the tax effects on interest paid to plaintiff for back wages and whether some additional sum must be included in

the award to offset the negative tax impact on the accumulated interest paid.

In challenging the appropriateness of such an adjustment, defendants' counsel has expressed the concern that the payment of such a award would in effect be a windfall to plaintiff and essentially a payment by the State of Mr. Ibrahim's tax obligations.

> Mr. Sanders: Basically again what it is that basically he is not going to have to pay a tax, we will pay the entire tax burden.

Transcript of November 10, 1997, at 27. Counsel's concern is unfounded. It is well established, as the parties agree, that the damages award in a discrimination case must, to the extent feasible, place the victim in the position he would have been in had the proscribed conduct not occurred – no better, no worse. *Id.* at 26-27. Adjustments or add-ons to defray the negative tax impact of a lump sum payment, including interest, are designed to accomplish that remedial goal. Mr. Ibrahim's award will not in effect include the taxes due on the award, but only such an amount that will fill the gap between the higher taxes he will pay and the lesser per annum amount he would have paid to taxing authorities on a yearly basis. Simply put, Mr. Ibrahim pays his own taxes. The State of New York does not.

The parties are directed to settle judgment within ten (10) days. The Court is mindful that a few minor, and relatively inconsequential, issues may linger. The Court fully expects, that counsel and their respective clients will quickly resolve any remaining discrepancies or uncertainties. Damages are a matter of proof even though, as in this case, they are not readily reduced to certainty.

SO ORDERED,

Dated: Brooklyn, New York
February 24, 1998

/s/ Raymond J. Dearie
RAYMOND J. DEARIE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

SHAWKI R. IBRAHIM,

Plaintiff,

- against -

NEW YORK STATE DEPARTMENT OF HEALTH, *et al.*,

Defendants.

----------X

MEMORANDUM & ORDER

CV 82 0177 (RJD)

DEARIE, District Judge.

The Court issued a Memorandum & Order in the above-captioned case on January 20, 1995, following a 1993 two-day trial on damages. In September 1996, plaintiff Shawki R. Ibrahim submitted a proposed judgment. In October 1996, in response to several communications from defendant, plaintiff submitted an amended proposed judgment. In response, defendant proposed a judgment that differed in several respects from plaintiff's submission.

Defendant's calculation of back pay damages recoverable by plaintiff is $91,146.00, while plaintiff arrives at a figure of $92,145.00. Adding the figures provided in plaintiff's Exhibit A, the Court determines that plaintiff's figure is a mathematical error. Plaintiff is entitled to $91,146.00 in back pay.

Plaintiff proposes that he be compensated for the 25 personal days devoted by him to this litigation, which is in

accord with the Court's finding in its January 1995 decision. Defendant's offer of 26 days appears to be a mistake.

The parties' proposed judgments also differ with respect to provisions for attorneys' and/or expert fees.

The parties dispute the interest rates, pursuant to 26 U.S.C. § 6621, to be applied to calculate pre-judgment interest. Defendant uses the interest rates for under-payments, as provided in section 6621 and IRS Revenue Ruling 96-28, for the relevant years. In a footnote to Exhibit B, plaintiff claims, without providing any support for his contention, that the higher interest rates payable on "large corporate underpayments" should be applied. The Court finds that defendant applies the proper interest rates.

Plaintiff seeks to be compensated for the negative tax consequences of receiving a lump sum payment. In its January 1995 decision, the Court directed that "[t]he damage award should . . . be enhanced to reflect [plaintiff's] increased tax liability." January 20, 1995 Mem. & Order at 20. During the damages trial, plaintiff offered expert testimony and introduced charts on the issue of adverse tax impact. April 12, 1993 Tr. 11-42. However, plaintiff's calculations in his amended proposed judgment are at variance with the proof offered at trial. For example, plaintiff's expert testified that he did not consider New York State taxes, while plaintiff's figures include state and local taxes. In addition, plaintiff's amended proposed judgment almost doubles the initial judgment's calculation of negative tax impact.

Defendant, on the other hand, contends that the income tax consequences are too speculative to warrant an award to plaintiff. In the alternative, defendant seeks

discovery and a hearing on the matter. The Court has difficulty understanding defendant's position since a full damages trial has already been held, and the Court has determined that at the trial, plaintiff offered evidence that he would suffer negative tax consequences.

In order to resolve this matter, the Court will conference this case on December 19, 1996 at 9:30 a.m.

SO ORDERED.

Dated: Brooklyn, New York
December 13, 1996

/s/ Raymond J. Dearie
RAYMOND J. DEARIE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

SHAWKI R. IBRAHIM,

Plaintiff, **ORDER**

- against - CV 82 0177 (RJD)

NEW YORK STATE
DEPARTMENT OF HEALTH,
et al.,

Defendants.

----------x

DEARIE, District Judge.

On September 14, 1995, plaintiff Shawki R. Ibrahim filed a motion for a new trial pursuant to FED.R.CIV.P. 59, asserting that he is entitled to a new trial on damages on numerous grounds. In this motion, Ibrahim argues, *inter alia*, that the Court erred in calculating his damages under Title VII, that the Court admitted certain evidence in violation of FED.R.EVID. 408, and that he is entitled to a new trial in the interests of justice because his medical condition prevented him from testifying at trial and prevented him from providing effective assistance to his counsel in the prosecution of this action. The Court is mindful of the high threshold showing that a party must make in order to obtain relief under Rule 59. *See Ball* v. *Interoceanica Corp.*, 71 F.3d 73, 76 (2d Cir. 1995) (emphasizing that a district court "should not grant a new trial merely because the losing party can probably present a better case on another trial") (citation omitted); 11A CHARLES A. WRIGHT ET AL., FEDERAL

PRACTICE & PROCEDURE, § 2804 (2d Ed. 1996) ("A motion for a new trial in a nonjury case . . . should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons."). Having fully considered the merits of plaintiff's motion for a new trial, the Court denies it.

SO ORDERED.

Dated: Brooklyn, New York
June 17, 1996

/s/ Raymond J. Dearie
RAYMOND J. DEARIE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

SHAWKI R. IBRAHIM,

Plaintiff,

ORDER

- against -

CV 82 0177 (RJD)

NEW YORK STATE
DEPARTMENT OF HEALTH,
et al.,

Defendants.

----------x

DEARIE, District Judge.

In this long-pending employment discrimination case, by Memorandum and Order dated January 20, 1995, this Court decided a number of legal and factual disputes regarding damages that were tried to the Court following the remand of the case from the Court of Appeals. The Court directed plaintiff to submit a proposed judgment. Unfortunately, in a characteristic development that has clearly impeded the resolution of this case, plaintiff discharged his trial attorney, as he has several earlier attorneys. A proposed judgment has not been submitted.

In the interim, several attorneys, including trial counsel, have submitted, or will shortly submit, applications for attorneys' fees. Resolution of these compelling claims must await completion of these proceedings and will accordingly be deferred until that time.

In the interest of bringing matters to a close, defendant's counsel is directed to submit no later than June 20, 1995 a proposed judgment in accordance with the Court's Memorandum and Order of January 20, 1995.

SO ORDERED.

Dated: Brooklyn, New York
June 1, 1995

/s/ Raymond J. Dearie
RAYMOND J. DEARIE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

SHAWKI R. IBRAHIM,

Plaintiff,

- against -

NEW YORK STATE DEPARTMENT OF HEALTH *et al.*,

Defendants.

----------x

MEMORANDUM & ORDER

CV 82 0177 (RJD)

DEARIE, District Judge.

BACKGROUND

The Finance Division of the New York State Department of Health (the "Department") contains the Bureau of Audit and the Bureau of Residential Health Care Facility Reimbursement ("the Reimbursement Bureau"). Within each bureau are grade 23 "associate" positions, grade 27 "principal" positions, and grade 29 "chief" positions. New York Civil Service Law provides that these positions are to be filled by selection from eligibility lists comprised of candidates who have passed the civil service exam required for the particular grade. Section 61 of the Civil Service Law gives bureau supervisors the discretion to decline to make permanent appointments from an eligibility list containing fewer than three active candidates.

Shawki Ibrahim, a well-educated, middle-aged man of Egyptian origin, began work with the Bureau of Audit in February 1976 as a senior medical facilities auditor. In November 1977, he was promoted provisionally to associate medical facilities auditor, a grade 23 position. He subsequently passed the appropriate civil service exam and was permanently appointed as an associate auditor in June 1978. Later that year, Mr. Ibrahim took and passed an open competitive service exam for the position of principal medical facilities analyst in the Bureau of Audit, a grade 27 position. Because there were no openings for that position, in December 1978, he was placed on an eligibility list for principal health care fiscal analyst ("PHCFA"), a similar grade 27 position in the Reimbursement Bureau, for which there were openings.

There were initially 13 active candidates on this eligibility list, all of whom interviewed for the position of PHCFA. Upon completion of the interviews, four of the candidates declined to be considered for the PHCFA position. Seven others were permanently appointed as PHCFA's on or about February 1, 1979. In addition, the Department temporarily appointed Michael Blinstrub, who had not been eligible to take the grade 27 open competitive examination, as a PHCFA.

At that point, there were three remaining PHCFA positions available within the Reimbursement Bureau. Only two active candidates, Mr. Ibrahim and one other, remained on the eligibility list. Invoking section 61 of the Civil Service Law, William Gormley, Director of the Reimbursement Bureau, declined to make any more permanent appointments from the eligibility list. Instead, he chose to retain two individuals who were already serving in PHCFA positions on a provisional basis (Alan Marshall and Robert Malecki) and

to appoint Henry Higgit, an associate health care fiscal analyst with the Reimbursement Bureau, to fill the third available PHCFA position on a provisional basis.

In August and October of 1979, the Department of Health recanvassed the list and each time found only two active candidates on the eligibility list. On both occasions, the Department chose to reappoint the provisional appointees. In June 1980, as a result of a meeting with Mr. Ibrahim and a representative of the affirmative action office, the Department recanvassed the list again and found six active candidates. Three of the candidates declined the interview and two temporarily declined after interviewing, including Mr. Ibrahim, who declined consideration for 90 days. With only one active candidate remaining on the list, the Department again decided to retain the provisional PHCFA's.

Subsequently, the Department held a grade 27 promotional civil service exam that was open only to those directly in line for promotion to PHCFA, *i.e.*, grade 23 analysts with sufficient seniority in the Reimbursement Bureau. Mr. Ibrahim was not eligible to take the promotional exam because he was employed by the Bureau of Audit. The eligibility list resulting from the promotional exam superseded the eligibility list from the open competitive test passed by Mr. Ibrahim. Marshall, Higgit, and Blinstrub passed the exam and were chosen to fill the permanent PHCFA positions. Malecki did not pass the exam and was demoted to associate health care fiscal analyst.

Mr. Ibrahim brought suit against the Department of Health under the Age Discrimination in Employment Act ("ADEA") and under Title VII for discrimination based on national origin. This Court conducted a three-day jury trial on the ADEA claim with the Title VII claim tried

simultaneously to the Court. The jury found for the Department on the ADEA claim and the Court ruled in favor of the Department on the Title VII claim. The Court denied Mr. Ibrahim's motion for j.n.o.v. with respect to the ADEA claim.

This Court found that the Department's proferred reasons for not appointing plaintiff were pretextual, but that plaintiff had been the victim of favoritism or cronyism, not discrimination based on national origin. The Court concluded that plaintiff had failed to sustain his burden of proving discrimination in violation of Title VII.

On appeal, the Court of Appeals reversed, finding that plaintiff's proof of pretext entitled plaintiff to prevail on his Title VII claim. The Circuit panel remanded the case for a trial on damages. *Ibrahim* v. *New York State Dep't of Health*, 904 F.2d 161 (2d Cir. 1990).

In September 1990, the Department offered Mr. Ibrahim a position in Albany, New York as a PHCFA. Mr. Ibrahim did not accept the offer. In April 1992, the Department renewed its offer, but Mr. Ibrahim again declined. After efforts by the parties to resolve the damages issue through settlement, this Court held a trial on damages on April 12 and 13, 1993.

DISCUSSION

I. Back pay

Mr. Ibrahim is entitled to an award of back pay. Title VII expressly includes back pay among the equitable remedies that a court may award if it determines that an employer has violated the statute. 42 U.S.C. § 2000e-5(g)(1)

(1964) (as amended 1991). Moreover, in this Circuit, "[a]n award of back pay is the rule, not the exception." *Carrero* v. *New York City Housing Authority*, 89 F.2d 569, 580 (2d Cir. 1989). There are, however, several outstanding issues concerning the amount of back pay to which Mr. Ibrahim is entitled.

A. Grade 29 Promotion

Mr. Ibrahim contends that he is entitled to back pay at the grade 29 level, rather than the grade 27 level, for the period from 1984 to the present. He argues that, had he been appointed as a grade 27 PHCFA in 1979, he would have achieved the grade 29 position of chief health care fiscal analyst ("CHCFA") by 1984. Mr. Ibrahim bases this contention on the fact that Henry Higgit, who did receive the grade 27 appointment in 1979, was promoted provisionally to the grade 29 position of CHCFA on or about January 25, 1984.[1] Although the Court is inclined to resolve close questions in favor of Mr. Ibrahim, it is constrained to conclude that Mr. Ibrahim has failed to demonstrate that, had he been appointed to the position of PHCFA in 1979, he, rather than Mr. Higgit, would have received the provisional promotion.

Once a plaintiff has shown that he has suffered damage, he need only demonstrate the amount of the damage with reasonable certainty, and "a wrongdoer has no right to insist upon a mathematically precise evaluation of damages suffered." *Contemp. Mission, Inc.* v. *Bonded Mailings*, 671

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[1] Sometime after November 12, 1992, the Department administered a CHCFA promotional examination. Mr. Higgit received only the third highest score on the exam and reverted back to his permanent status as a grade 27 PHCFA.

F.2d 81, 84 (2d Cir. 1982). An award of damages may not, however, be based on speculation. *Proulx* v. *Citibank, N.A.*, 681 F.Supp. 199, affirmed 862 F.2d 304 (S.D.N.Y. 1988).

The Court acknowledges that, in assessing damages under Title VII, it must "so far as possible" restore Mr. Ibrahim to the position he would have been in but for the unlawful discrimination. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1972); *Whittlesey* v. *Union Carbide Corp.*, 742 F.2d 724, 727-28 (2d Cir. 1984). When it is possible to reconstruct with reasonable accuracy the progress an employee would have made but for the unlawful discrimination, a damage award which accounts for any promotions the plaintiff would have received during the period in question is clearly appropriate. Such an award would be appropriate where "the promotion is in a line of progression where a promotion is normally forthcoming after some interval of time in the lower level job." *Young* v. *Edgcomb Steel Co.*, 499 F.2d 97 (4th Cir. 1974). *See also*, *Locke* v. *Kansas City Power and Light Co.*, 660 F.2d 359, 369 (8th Cir. 1981); *Saunders* v. *Claytor*, 629 F.2d 596, 597-98 (9th Cir. 1980).

Where a promotion is not routine, however, the Court is not required to speculate as to what the plaintiff's progress would have been but for the discrimination. The Second Circuit recently stated:

> Certainly, a court is not required to construct a hypothetical career path on a retrospective basis, relying upon mere probabilities or a plaintiff's hopes and ambitions. *Sands* v. *Runyon*, 28 F.3d 1323, 1329 (2d Cir. 1994).

At least one court has explicitly held that "job-skipping" is only permissible where a promotion is routine after a certain amount of time in a lower level job. *Locke* v. *Kansas City Power and Light Co.*, 660 F.2d 359, 369 (8th Cir. 1981). *But see Malarkey* v. *Texaco, Inc.*, 794 F.Supp. 1237 (S.D.N.Y. 1992) (approving of "job-skipping" when, at the time damages are assessed, plaintiff has achieved a higher level job than the one she was unlawfully denied).

Mr. Ibrahim does not claim that he would have been routinely promoted to the higher position. There was no guarantee that any given PHCFA in the Reimbursement Bureau would ultimately have been promoted to CHCFA, as there are relatively few CHCFA positions and many possible candidates.

The Reimbursement Bureau employs only two CHCFA's. When a CHCFA position becomes available, the Department can fill it in one of two ways. First, the Department can appoint someone from a civil service list of eligible candidates. If no eligible list exists, section 65 of the Civil Service Law authorizes the Department to appoint someone provisionally, as was done in this case. Section 65 provides the following with respect to provisional appointments:

> Whenever there is no appropriate eligible list available for filling a vacancy in the competitive class, the appointing officer may nominate a person to the state civil service department or municipal commission for non-competitive examination, and if such nominee shall be certified by such department or municipal commission as qualified after such noncompetitive examination, he may be

> appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination. Such non-competitive examination may consist of a review and evaluation of the training, experience and other qualifications of the nominee, without written, oral or other performance tests.

Under section 65, the decision to appoint someone on a provisional basis is within the discretion of the appointing officer. A provisional appointee does not have to be fully qualified for permanent employment or even be eligible to take the civil service exam for the position in question. *O'Reilly* v. *Evans*, 436 N.Y.2d 795 (1980). Provisional appointments are made primarily with a view to the appointee's qualifications to serve in the position for the period of an emergency and are not necessarily indicative of fitness to occupy the position permanently. *Friedman* v. *Delaney*, 269 N.Y.S. 995 (1933).

The appointing officer who nominated Mr. Higgit for the provisional promotion in 1984 presumably chose from a very large field of candidates. At the time, there were 19 PHCFA's in the Finance Division and an unknown number of people in similar civil service positions throughout the Department. Moreover, the appointing officer was not limited to people within the Department, but could have nominated anyone he believed could pass a non-competitive examination. At the trial on damages, a portion of the deposition of William Gormley, Director of the Reimbursement Bureau in 1979 and Assistant Director of Health Care Financing from 1981 through 1989, was read into the record. When asked about the selection of provisional appointees, Mr. Gormley stated:

> There are employees who are working there and doing the job in the next lower grade. They would get consideration. But if it's somebody's decision that those folks were not qualified at that point in time, they did not have enough experience, there were other bureaus that had the same titles, somebody from another bureau or somebody from the outside or somebody with a comparable title.

Mr. Ibrahim did not testify at the trial on damages, so the Court does not have the benefit of his first-hand explanation as to why he believes he would have been the one to receive the provisional promotion. In fact, he requested back pay at the grade 29 level for the first time in his submissions to the court following the trial on damages. In those submissions, he states that he was "better qualified" than Mr. Higgit at the time Mr. Higgit was appointed as a PHCFA and that his work performance up to the time in question had been impressive. He cites favorable reviews he received from his superiors.

Based solely on his qualifications for the position of PHCFA and his performance reviews, Mr. Ibrahim concludes that, had he been appointed as a PHCFA in 1979, he would have been the one to receive the provisional promotion to CHCFA in 1984. He offers no evidence to support this conclusion. Mr. Ibrahim provides no evidence of how many people the appointing officer actually considered for the appointment or what factors guided his decision. Presumably, the decision depended largely on prior job performance, yet Mr. Ibrahim offers no evidence regarding the work performance of Mr. Higgit or any potential candidate for the provisional appointment. In the absence of such evidence, the Court cannot now reasonably determine what Mr. Ibrahim's

prospects would have been for provisional appointment to the grade 29 position.

While mindful of the importance of compensating Mr. Ibrahim as fully as possible, the Court finds that Mr. Ibrahim has failed to demonstrate with reasonable certainty that, had be been appointed as a PHCFA in 1979, the appointing officer would have chosen him out of all the possible candidates for the provisional appointment to CHCFA in 1984. An award of damages based on that assumption would be unduly speculative.

B. The Time Period of the Department's Liability

There is no dispute that the defendants' liability begins in February 1979 when Mr. Ibrahim was initially denied the position of PHCFA. The parties do differ as to whether the accrual of back pay should be tolled as of September 1990 when the Department first offered Mr. Ibrahim the PHCFA position. The Department of Health claims that it extended Mr. Ibrahim an unconditional offer of employment at that time and that Mr. Ibrahim's rejection of that offer tolls accrual of back pay. Mr. Ibrahim asserts that the offer was conditional and that it was reasonable for him to reject the offer when it was made.

The Supreme Court in *Ford Motor Co.* v. *E.E.O.C.*, 102 S.Ct. 3057 (1982) held that "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability." *Ford Motor Co.* at 3070. *See also*, *Clarke* v. *Frank*, 960 F.2d 1146, 1151-52 (2d Cir. 1992). The first issue to be resolved is whether the Department's 1990 offer was unconditional.

In a letter to Mr. Ibrahim's lawyer dated September 26, 1990, Assistant Attorney General Charles F. Sanders offered Mr. Ibrahim the appointment to a permanent PHCFA position. Mr. Ibrahim was, however, required to serve a probationary period. Mr. Ibrahim now argues that the offer of employment was conditional because it required him to go through such a probationary period. The Department argues that the probationary period is required by the Civil Service Law.

New York Civil Service Law § 63 provides, in pertinent part:

> Every original appointment to a position in the competitive class and every interdepartmental promotion from a position in one department or agency to a position in another department or agency shall be for a probationary term; provided, however, that upon interdepartmental promotion the appointing officer may waive the requirement of satisfactory completion of the probationary term.

The Department contends that the probationary period was not waivable in Mr. Ibrahim's case. The parties do not dispute that the civil service exam that Mr. Ibrahim passed was an open competitive exam, not a promotional exam. According to the Department, therefore, the transfer from the Bureau of Audit to the Reimbursement Bureau would have been an original appointment rather than an interdepartmental promotion. The Court credits this explanation and finds that the probationary period was required by section 63 of the Civil Service Law.

Furthermore, the probationary period was an ordinary incident of employment with the Department of Health and is not the type of condition that the Court appeared to be contemplating in *Ford Motor Co.* v. *E.E.O.C.*, 102 S.Ct. 3057 (1982). In stating that an employer's offer of employment must be unconditional if it is to have the effect of tolling back pay, the court appears to have been contemplating a job offer conditioned on the compromise of an employee's claim against the employer. *See Ford Motor Co.*, 102 S.Ct. at 3066, n.18. Subsequent cases have confirmed this interpretation. *See, e.g., Toledo* v. *Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989); *Figgs* v. *Quick Fill Corp.*, 766 F.2d 901 (5th Cir. 1985). Normal incidents of employment, such as passage of a driver's test or a physical examination, do not render an offer conditional for the purposes of tolling back pay. *See, Clarke* v. *Frank*, 960 F.2d 1146, 1151 (2d Cir. 1992). A probationary period required by law is such an incident and did not render the Department's offer conditional.

That does not end the inquiry, however. It is necessary to determine whether there were special circumstances which made Mr. Ibrahim's rejection of the Department's unconditional offer reasonable. A party is generally not allowed to recover for losses which he could have reasonably mitigated. *See, e.g., Federal Insurance Co.* v. *Sabine Towing & Transportation Co.*, 783 F.2d 347, 350 (2d Cir. 1986); *Lund* v. *Chemical Bank*, 797 F.Supp. 259 (S.D.N.Y. 1992). In *Pierce* v. *F.R. Tripler & Co.*, 955 F.2d 820, 830 (2d Cir. 1992), the Second Circuit stated:

> While an unconditional offer of a job substantially similar to the one denied the plaintiff may, as a matter of law, toll back pay, the ultimate issue in a mitigation of

> damages question is whether the plaintiff acted reasonably in attempting to gain other employment or in rejecting proffered employment.
>
> "Generally, it is the duty of the trier of fact to weigh the evidence to determine whether a reasonable person would refuse the offer of reinstatement." (citing *Fiedler* v. *Indianhead Truck Line*, 670 F.2d 806, 808 (8th Cir. 1982)).

Mr. Ibrahim offers a host of reasons why his refusal of the Department's offer was justified. The first is that the Department's insistence on a probationary period was unreasonable and that it would have been degrading for him to have to undergo such a probationary period at his age. As discussed above, the Civil Service Law mandates a probationary period for all original appointees, regardless of age, and its imposition was not therefore, unreasonable. In addition, the appointment Mr. Ibrahim initially pursued entailed a probationary period. He was entitled to be given what he sought -- nothing more.

Mr. Ibrahim next contends that it was reasonable for him to reject the Department's offer because the funding of the position was "temporary" and he had no guarantee that the funding would continue beyond the State's 1991 fiscal year. As Department officials satisfactorily explained at length during the trial on damages, the Department established the position for Mr. Ibrahim in the middle of the State's fiscal year. All positions established between budget cycles are deemed temporary until the legislature changes the designation. As Mr. Anderman, Deputy Director of the Division of Health Care Financing of the New York State

Department of Health, explained during his testimony, a temporary classification does not have any effect on the individual employee's civil service rights or protections. Designation of the position as "temporary" was a matter of budgetary planning. The Department informed Mr. Ibrahim that he was being offered a permanent position and he was not justified in rejecting the offer based on the fact that the position was funded on a temporary basis.

The next justification that Mr. Ibrahim offers for rejecting the offer is that the offer "failed to provide for seniority." This argument is frivolous. The Court in *Ford Motor Co.* v. *E.E.O.C.* explicitly held that an employer's unconditional offer of the job an employee originally sought need not be supplemented by an offer of retroactive seniority. *Ford Motor Co.* v. *E.E.O.C.*, 102 S.Ct. 3057, 3066 (1982). Once the claimant accepts an unconditional offer, he is entitled to full compensation if he prevails in his suit. The court may then award retroactive seniority and any damages suffered as a result of the claimant's reduced seniority prior to the court's judgment, along with ordinary back pay which accrued prior to the effective date of the offer. *Ford Motor Co.*, 102 S.Ct. at 3066. However, the failure of the employer to provide retroactive seniority as part of the offer of reinstatement is clearly not a justification for refusing such an offer.

Mr. Ibrahim further contends that it was reasonable for him to refuse the offer because it required him to move on short notice to Albany, where the position was located. However, it is clear now, as it was in 1979, that the only location for the position of PHCFA is in Albany.

Mr. Ibrahim suggests that the Department should have placed him in another grade 27 position which was available

in New York City -- principal medical facilities auditor. The purpose of the offer, however, was to restore Mr. Ibrahim to the position he would have been in but for the unlawful discrimination. The Department attempted to do that by offering him the job he originally sought.

Mr. Ibrahim further argues that, if the Department of Health had to create a new position for him, they should have created one in New York City. He offers no support, however, for the proposition that an employer should be required to create an additional position in a location where no such positions existed previously. Mr. Ibrahim was offered the exact same job that he was denied in 1979.

Mr. Ibrahim also claims that he was not given sufficient notice of his starting date. The Department notified Mr. Ibrahim of the offer approximately two weeks before the proposed starting date. The initial starting date was September 13, but based on a conversation that took place on September 10 between Assistant Attorney General Sanders and Mr. Ibrahim's attorney at the time, Mr. Ligansky, the date was postponed to September 27. It is likely that Mr. Ibrahim learned of the September 27 date immediately after that conversation between his attorney and Mr. Sanders. If not, however, he clearly knew about the September 27 date by September 17. On that date, Mr. Veino, an Associate Attorney in the Division of Legal Affairs, issued a memorandum memorializing Mr. Sanders' conversation with Mr. Ligansky, who had advised Mr. Sanders that Mr. Ibrahim would not be prepared to report to Albany until all issues relating to damages were solved and a final judgment was rendered by the Court. Clearly, by the time that memorandum was issued, Mr. Ibrahim was aware of the fact that the starting date was to be September 27. The Court finds that approximately two weeks' notice was reasonable.

Mr. Ibrahim has also indicated that he was concerned about a potentially hostile work environment. While such concerns are understandable in this type of case, Mr. Ibrahim has failed to allege any specifics which would constitute "special circumstances" justifying the rejection of an unconditional offer. General concerns about a hostile environment will not justify a refusal to accept an otherwise unconditional offer of employment. A victim of discrimination may reasonably fear that a return to the work place following vindication of his rights might occasion a hostile reception or mistreatment. However, absent specific evidence that the employer or supervisor lies in wait to exact some level of retribution, a victim's refusal to accept an unconditional offer brings to a close the employer's period of liability for back pay.

Finally, several factors indicate that Mr. Ibrahim's decision to reject the offer was based at least in part on his feeling that he should start at the grade 29 level and on his concern that the damages issues had not yet been settled. For example, Mr. Sanders testified that he received a phone call from Mr. Ligansky stating that the offer was unsatisfactory because Mr. Ibrahim should be starting at a grade 29 position. Moreover, the memorandum issued by Mr. Veino indicates that Mr. Ibrahim did not intend to commence work until all damages issues were resolved.

Mr. Ibrahim's concerns did not obviate his duty to mitigate damages by accepting an unconditional offer of the job he originally sought. Mr. Ibrahim's acceptance of the Department's offer would have in no way affected his right to pursue any further claims against the Department, including his claim that he should have been appointed at the grade 29 level. *See Curl* v. *Reavis*, 740 F.2d 1323, 1330-31 (4th Cir. 1984). Moreover, it is illogical to suggest that he

did not have a duty to mitigate damages until the amount of damages was ultimately determined.

Mr. Ibrahim has not demonstrated that he acted reasonably in rejecting the Department's unconditional offer of employment. Mr. Ibrahim was appointed to precisely the same position he was denied in 1979, in precisely the same location. He was given approximately two weeks' notice of the starting date. Had he accepted the position, he would have been free to pursue his claim that he should have been appointed to a grade 29 position, and his acceptance of the offer would have in no way affected the Court's calculation of damages up to the effective date of the offer.

Mr. Ibrahim failed to take reasonable steps to mitigate his damages. Accordingly, the Court finds that the accrual of back pay was tolled as of September 27, 1990, the effective date of the Department's unconditional job offer. Mr. Ibrahim is entitled to back pay for the period running from February 1979 through September 27, 1990.

Because Mr. Ibrahim failed to mitigate his damages by accepting the Department's unconditional offer, an award of front pay is foreclosed. *See Ford Motor Co.* v. *EEOC*, 102 S.Ct. 3057, 3066-67 (1982); *Dominic* v. *Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1258 (2d Cir. 1987).

C. Additional Back Pay Issues

Mr. Ibrahim is entitled to prejudgment interest on the back pay award. *See Loeffler* v. *Frank*, 486 U.S. 549 (1988); *Clarke* v. *Frank*, 960 F.2d 1146 (2d Cir. 1992). Contrary to Mr. Ibrahim's assertion, however, the interest should be compounded annually rather than daily. Second Circuit case law clearly favors this result. *See, e.g., EEOC* v. *Local 638*,

674 F.Supp.91, 105-06 (S.D.N.Y. 1987); *Marshall* v. *Meyer Memorial Hosp.*, 30 FEP Cases 1577, 1590 (W.D.N.Y. 1982), *Aff'd*, 751 F.2d 79 (2d Cir. 1984); *Association Against Discrimination For Employment, Inc.* v. *City of Bridgeport*, 572 F.Supp. 494, 495 (D. Conn. 1983).

Mr. Ibrahim has presented evidence that he will suffer a substantial negative tax impact as a result of receiving the back pay in a lump sum rather than over a period of years and requests that the Court award him damages to account for that negative tax impact. Although the case law on this issue is mixed, it appears that it is within the court's discretion to make such an award if a plaintiff has actually proven an adverse tax impact.

At least two courts have explicitly approved such an award. In *Sears* v. *Atchison, Topeka & Santa Fe Ry.*, a Title VII case, the Tenth Circuit held that the district court did not abuse its discretion when it included a tax component in the back pay award. 749 F.2d 1451, 1456 (10th Cir. 1984). The court in *Sears* emphasized the protracted nature of the litigation and the fact that the plaintiffs would be receiving seventeen years of back pay in a lump sum. In *Gelof* v. *Papineau*, an ADEA case, the court approved a tax component when the plaintiff had proven that she would suffer additional tax consequences as a result of the lump sum back pay award. 648 F.Supp. 912, 930 (D. Del. 1986), *vacated and remanded in part on other grounds*, 829 F.2d 452 (3rd Cir. 1987). *But see Dashnaw* v. *Pena*, 12 F.3d 1112, 1116 (D.C.Cir. 1994) (holding that "the general rule that victims of discrimination should be made whole does not support 'gross-ups' of backpay to cover tax liability.").

Two other cases suggest that, when a plaintiff has actually proven that he will suffer an adverse tax impact, it

may be appropriate for the court to account for the increased tax liability it its calculation of damages. In *Blim* v. *Western Elec. Co. Inc.*, an ADEA case, the Tenth Circuit held that the district court erred in awarding damages for increased tax liability, but based its decision on the fact that any tax penalty would be virtually eliminated by the income-averaging provisions of the tax laws. 731 F.2d 1473, 1480 (10th Cir. 1984). Likewise, in *Hukannen* v. *Inter. Union of Operating Engineers*, the Eight Circuit found that the district court had not abused its discretion in denying an enhancement for increased tax liability because the plaintiff in that case had not presented any evidence regarding the amount of her additional tax liability. 3 F.3d 281, 287 (8th Cir. 1993).

The general objective of awarding back pay to victims of employment discrimination is to put them in the position they would have been in but for the discrimination. When a plaintiff has proven that he will suffer a negative tax impact from receiving the back pay in a lump sum, it is consistent with that general objective to compensate him accordingly. Mr. Ibrahim has presented uncontested evidence that he will pay substantially more taxes on the back pay award than he would have paid had he received the money over a period of years. The damage award should therefore be enhanced to reflect his increased tax liability.

II. Additional Damages

Mr. Ibrahim is entitled to be reimbursed for the expenses he incurred in connection with this litigation, including reasonable attorney's and expert fees. *See 42 U.S.C. § 2000e-5(k).*

Finally, the Court grants Mr. Ibrahim's request that he be compensated for the 25 vacation and personal days which he devoted to this litigation. *See, e.g., Lenihan* v. *City of New York,* 636 F.Supp. 998, 1016 (S.D.N.Y. 1985).

CONCLUSION

Mr. Ibrahim is entitled to back pay at the grade 27 level from February 1, 1979 through September 27, 1990 plus prejudgment interest, compounded annually. He is also entitled to the negative tax impact of receiving the back pay in a lump sum. In addition, he should be compensated for the vacation days he was forced to take as a result of this litigation. Finally, he is entitled to be reimbursed for expenses he has incurred in connection with this litigation, including reasonable attorney's and expert fees.

Plaintiff's counsel is directed to submit a proposed judgment on three days' notice to defendants.

SO ORDERED.

Dated: Brooklyn, New York
January 20, 1995

/s/ Raymond J. Dearie
RAYMOND J. DEARIE
United States District Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------X

SHAWKI R. IBRAHIM,

Plaintiff-Appellant,

v.

NEW YORK STATE DEPARTMENT OF HEALTH, OFFICE OF HEALTH SYSTEMS MANAGEMENT, NEW YORK STATE DEPARTMENT OF CIVIL SERVICES, NEW YORK STATE DEPARTMENT OF AUDIT AND CONTROL,

No. 494
Docket 89-7454.

OPINION

Defendants-Appellees.

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Robert Ligansky, New York City, for plaintiff-appellant.

Charles F. Sanders, Asst. Atty. Gen. of the State of N.Y. (Robert Abrams, Atty. Gen. of the State of N.Y., Barbara B. Butler, Asst. Atty. Gen. of the State of N.Y., of counsel), New York City, for defendant-appellee New York State Dept. of Health, Office of Health Systems Management.

Before OAKES, Chief Judge, CARDAMONE, Circuit Judge, and POLLACK, District Judge*

CARDAMONE, Circuit Judge:

On this appeal we consider whether appellant who passed an open competitive civil service examination, but did not receive an appointment in the grade to which he was thereby entitled, successfully proved a Title VII violation. Federal and state laws designed to eliminate the pernicious effects of the "spoils system"--a concept that U.S. Senator William L. Marcy found unobjectionable when he first coined the phrase in 1832--have largely eradicated the notion that public office should be a reward for political work. We are faced instead with a more subtle form of favoritism, a partiality of the appointing officials to those persons already at work in the subject agency. The advancement of such persons in public office without regard to the purpose of those laws which mandate that such appointments be based on merit and fitness is called cronyism. The reason for not appointing an otherwise qualified outsider may not rest solely on a preference for present workers where, as here, this reason is merely a mask to cover discriminatory animus.

Appellant, Shawki Ibrahim, who had passed the required New York State grade 27 civil service examination for the position of Principal Health Care Fiscal Analyst (principal fiscal analyst) and had been on an eligibility list for that position since December 12, 1978, appeals from a March 29, 1989 order of the United States

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* Hon. Milton Pollack, Senior United States District Judge for the Southern District of New York, sitting by designation.

District Court for the Eastern District of New York (Dearie, J.) holding that appellee, the New York State Department of Health (Department), Office of Health Systems Management, did not violate Title VII, 42 U.S.C. § 2000e *et seq.* (1982), by failing to promote him. Ibrahim also appeals the district court's denial of his motion for judgment notwithstanding the verdict (j.n.o.v.) or, in the alternative, for a new trial after the jury found in favor of the Department on Ibrahim's claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1982). We reverse the denial of relief under Title VII, but decline to reach or decide appellant's claim under the ADEA, and remand the case to the district court for a determination of damages.

FACTS

The Department, contains the Office of Public Health and the Office of Health Systems Management. Within the Office of Health Systems Management lies the Finance Division which contains both the Bureau of Audit, the bureau in which appellant began his career at a grade 23 position, and the Bureau of Residential Health Care Facility Reimbursement (Reimbursement Bureau), the bureau which denied appellant a promotion to a grade 27 position forming the basis of this litigation. Both bureaus provide grade 23 "associate" and grade 27 "principal" positions. Under New York law, these positions are ordinarily filled by selection from lists of those who have passed the required civil service examination. If the names of fewer than three active candidates appear on an eligibility list, § 61 of the New York Civil Service Law provides bureau supervisors with the discretion to decline to make permanent appointments.

Appellant is an exceptionally well-educated middle-aged Egyptian holding bachelor's and masters'

degrees in accounting, law, economics and political science from several Egyptian Universities. He came to the United States in 1971 and obtained a master's degree in accounting from Long Island University, a CPA appointment from the State of New York, and earned 26 credits from Brooklyn Law School that made him eligible to take the New York State Bar Examination. He began employment with New York State in February 1976 as a senior medical facilities auditor. In November 1977 he was promoted provisionally to associate medical facilities auditor, a grade 23 position, passed the appropriate civil service exam, and was permanently appointed as an associate auditor on June 8, 1978.

Ibrahim was well respected in this position, two of his former supervisors testified that the Bureau of Audit intended to promote him to principal medical facilities analyst, which was the next available grade 27 position. In 1978 appellant took and passed the civil service exam for this analyst position, being one of the 22 out of 49 who passed. But since there were no openings available, he was placed on an eligibility list on December 12, 1978 for a similar grade 27 position in the Reimbursement Bureau. The Department canvassed this list to determine if any of the candidates were interested, and then scheduled the 13 active candidates, including appellant, for an initial round of interviews.

Ibrahim attended a 40-minute interview with the Director of the Reimbursement Bureau, William Gormley, in which he alleges Gormley engaged in negative interviewing by discussing only the difficulties of the principal fiscal analyst position. Of those interviewed, four persons subsequently declined to be considered for the position and seven others were appointed as principal fiscal analysts in February 1979. At this time, the Department also

temporarily appointed Michael Blinstrub as a principal fiscal analyst. Blinstrub--who was not eligible to take the grade 27 open-competitive examination that Ibrahim had passed--had taken the position on the understanding that he could be supplanted by the employee that he was "temporarily" replacing if that employee's provisional appointment to a higher grade did not become permanent.

With only appellant and Joseph Culpo remaining as eligible active candidates from the original 13, the Department determined that it was not obligated to appoint a candidate to a permanent principal fiscal auditor position under § 61 of the Civil Service Law. It chose instead to retain three present employees, Alan Marshall and Robert Malecki, who were working in these auditing positions on a provisional basis, and Henry Higgit, an associate health care fiscal analyst, to fill the remaining principal positions provisionally. Malecki and Higgit did not have sufficient seniority to sit for the grade 27 civil service exam, and Marshall had failed the open competitive examination which appellant had passed.

In August and October 1979, the Department recanvassed the eligibility list attempting to find three active candidates. With an eligibility list consisting of only two active candidates--appellant and one other--the Department on both occasions exercised its discretion to reappoint the provisional appointees pending certification of an eligibility list containing at least three active candidates. As a result of an informal conference held on June 7, 1980 between appellant, Department officials, and a member of the affirmative action office, the Department agreed to re-interview Ibrahim when a re-canvass produced an active list of candidates. Upon re-canvass of the list of six candidates,

three declined, and two, including appellant, temporarily declined after the interview.

At the interview, appellant stated that he would not be interested in the provisional public health care fiscal analyst position held by Blinstrub--one of the positions offered at the interview--because the position could be lost were another employee unable to attain a permanent position at a higher grade. The appellant also expressed concern about accepting one of the four positions held provisionally, after being advised that if he were appointed the existing provisional employee would be demoted and work under appellant's supervision. Ibrahim stated that he was leaving for Egypt the next day and was advised that he must therefore temporarily decline consideration for 90 days, which he confirmed in a letter dated June 28, 1980. With only one active candidate remaining on the eligibility list after the interviews and the Bureau about to embark on a rate setting scheme, the Department decided to "take a conservative approach and maintain the status quo" and thereby retained its provisional principal analysts.

In March 1981 the Department again re-canvassed the eligibility list of four candidates. They interviewed the two candidates who had temporarily declined consideration and decided not to interview appellant and the remaining candidate because they had been previously interviewed. Since there were only two active candidates left on the list, the Department once again, as in 1980, elected to retain the three provisional appointees.

In the interim, a grade 27 examination was held pursuant to § 51 of the New York Civil Service Law. This examination was different than the open- competitive test that appellant originally passed because it was given only

to applicants "in line" for a promotion to the principal fiscal analyst position. That is, it was given to grade 23 analysts with sufficient seniority in the Reimbursement Bureau and not grade 23 analysts in other bureaus. The eligibility list resulting from the promotional test superseded the prior eligibility list derived from the open-competitive test passed by Ibrahim under § 56 of the Civil Service Law. Marshall, Higgit and Blinstrub, the three provisional principal analysts, passed and were chosen off the eligibility list to fill the permanent positions. The other provisional appointee, Malecki, did not pass and was demoted to associate fiscal analyst.

PROCEEDINGS BELOW

Appellant originally brought this action under the Civil Rights Act, 42 U.S.C. §§ 1981 and 1983 (1982), Title VII, 42 U.S.C. § 2000e *et seq.* (1982), and New York Executive Law, N.Y. Exec. Law § 296(1)(a) & (e) (McKinney 1982), against the Department and other state defendants. In an opinion entered on February 1, 1984, the district court (McLaughlin, J.) granted defendants' motion for summary judgment with respect to all claims, except plaintiff's claims under Title VII and New York Executive Law § 296(1)(a). Ibrahim v. New York State Dep't of Health, 581 F.Supp. 228 (E.D.N.Y.1984). Later, appellant successfully moved to amend his complaint to include an age discrimination claim. He also moved to amend his complaint to add a national origin claim under 42 U.S.C. § 1981 (1982). The Department responded by moving to amend its answer to include an affirmative defense of collateral estoppel against the age discrimination claim. The district court denied both motions.

A three-day trial was held on the ADEA and Title VII claims; the ADEA claim before a jury and the Title VII claim before the court. At trial, the Department moved for a directed verdict after the close of appellant's case and again at the end of the trial. Judge Dearie denied both motions, determining that Ibrahim had presented a prima facie case of discrimination, and that the burden had shifted to the Department to produce a legitimate nondiscriminatory reason for their failure to appoint Ibrahim. The jury returned a verdict in favor of the Department on the ADEA claim and the court ruled for the Department on the Title VII cause of action. In explaining its holding from the bench, the district court simply stated that it "credit[ed] the testimony of the state officials to the effect that they did not intend to discriminate against [appellant] because of his age, and ... national origin...." The trial court then concluded that the Department intended to protect the provisionals already part of the Reimbursement Bureau and had "absolutely no intention of offering the position to Mr. Ibrahim, or for that matter, anybody else[.]" The district court stated that while this motive might be contrary to the law's spirit at "least in this case we have a technical compliance with the Civil Service Law."

Appellant made a motion for j.n.o.v. under Fed.R.Civ.P. 50(b) or, in the alternative, for a new trial under Fed.R.Civ.P. 59 on the basis that a medical condition hindered his speech, which Judge Dearie denied. In denying j.n.o.v., the trial judge suggested that although Ibrahim established a prima facie case of discrimination and "may have proven ... that defendant violated the civil service law and defendant's own affirmative action policies" a reasonable jury could find and the evidence supported the court's finding that the Department's failure to promote Ibrahim was for nondiscriminatory reasons. *See Ibrahim* v. *New York State*

Dep't of Health, No. CV 82-0177 *slip op.* at 1- 2, 1989 WL 35926 (E.D.N.Y. Mar. 29, 1989). As to the motion for a new trial, the court found Ibrahim's speech comprehensible. *Id.*

DISCUSSION

I

Appellant alleges that the Department's failure to promote him to the position of principal fiscal analyst was based upon his Egyptian-Arabic national origin and was therefore in violation of Title VII, 42 U.S.C. § 2000e-2(a) (1982). Section 2000e-2(a) provides, in pertinent part, that:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... national origin; or
>
> (2) to limit ... or classify ... employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such ... national origin.

The Supreme Court fashioned the manner in which a Title VII action is presented by establishing the now familiar pattern of shifting burdens of proof. Complainant has the initial burden of proving a prima facie case of

discrimination, the burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for its action and, finally, complainant must show that the employer's stated reason was pretextual. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973). Once the employer satisfies its burden of production, the inquiry moves to "a new level of specificity," where the plaintiff has the burden of persuading the court "that the proffered reason was not the true reason for the employment decision." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255-56, 101 S.Ct. 1089, 1094-95, 67 L.Ed.2d 207 (1981). The plaintiff may carry this burden "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256, 101 S.Ct. at 1095.

This structure of proof is premised on the assumption that if all valid, nondiscriminatory business reasons for an employment decision are eliminated, "common experience with employment discrimination suggests it is likely that the decision was based on unlawful considerations." *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir.1988); *see also Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 576, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). Ultimately, the trial court must decide the question of whether the employer intentionally discriminated against the plaintiff--i.e., it must determine "whether defendants' purported business reasons are actually such." *Gibson* v. *American Broadcasting Co.*, 892 F.2d 1128, 1132 (2d Cir.1989).

II

Here--as the district court found and appellee does not contest--appellant has established a prima facie case of employment discrimination. Analysis turns therefore to whether the Department proffered a legitimate nondiscriminatory reason for its action. At trial, Department officials maintained that § 61 of the New York Civil Service Law granted them discretion to provisionally appoint a principal fiscal analyst instead of hiring a permanent employee from the eligibility list of persons passing the grade 27 examination. Given this discretion they asserted that the institutional benefits derived from reducing employee dislocation combined with favorable performance evaluations of the three provisional employees justified their decision not to hire appellant.

We begin our discussion with a brief review of the Civil Service Law of New York. As the Department contends, § 61 has consistently been interpreted to provide state employers with the discretion to depart from eligibility lists when those lists contain the names of fewer than three active candidates. Winkler v. Moore, 110 Misc.2d 785, 787, 442 N.Y.S.2d 937 (Sup.Ct.1981). Since the first eligibility list and every successive eligibility list contained the names of no more than two active candidates, the Department could properly decline to make permanent appointments from the lists provided.

The mere fact that the Department enjoyed the discretion to depart from the eligibility lists or was entitled under state law to appoint and re-appoint provisionals does not explain its refusal to promote appellant. To rebut a plaintiff's prima facie case of employment discrimination under Title VII it is not enough for a state agency simply to

rely on the broad discretion granted it under state law to make hiring decisions. *See Tye* v. *Bd. of Educ. of the Polaris Joint Vocational School Dist.*, 811 F.2d 315, 320 (6th Cir.1987). Instead, the employer must articulate the reasons underlying the exercise of its discretion. *Id.*

Title VII is by congressional design a federally mandated limitation on the discretion of employers with respect to their employment decisions. As such, it proscribes employment discrimination based on the race, religion, gender or national origin of an applicant. The requirement that an employer articulate with some specificity a nondiscriminatory reason for a hiring decision--adverse to a plaintiff who has produced a prima facie case--furthers the congressional aim by affording some small access to the otherwise hidden realm of employer motivation. *Dister*, 859 F.2d at 1111-12; *Sweeney* v. *Research Found. of St. Univ. of N.Y.*, 711 F.2d 1179, 1185 (2d Cir.1983). This requirement also provides a plaintiff with "a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095.

Thus, had the Department simply relied on the broad discretion granted it under § 61 as its justification for denying Ibrahim promotion, there is little doubt that it would have failed to articulate a legitimate, nondiscriminatory reason for its employment decision with enough specificity to rebut appellant's prima facie ease of employment discrimination. The Department did not simply rely on its discretion, but provided testimony explaining its reasons. William Gormley and Kevin Wemett, both Reimbursement Bureau supervisors, testified that those retained and re-appointed as provisional principal fiscal analysts possessed, as functioning members of the Reimbursement Bureau, experience with and knowledge of the Department's

procedures and rate-setting methods superior to appellant's. Given the provisional employees' satisfactory performance evaluations and that appellant received the lowest passing score on the promotional exam, Gormley concluded that "the provisional employees serving in the [principal fiscal analyst] positions were considered to have superior ability." Similarly, Wemett testified that the time constraints dictated by the Department's embarkation upon a new rate-setting program motivated the Reimbursement Bureau "to take a conservative approach and maintain the status quo" by exercising its discretion to re-appoint the provisionals after their third canvass of the eligibility list in the summer of 1980.

This testimony articulates a legitimate, nondiscriminatory reason for the Department's decision to keep its provisional employees rather than to appoint Ibrahim to a permanent position. *Burdine*, 450 U.S. at 254, 101 S.Ct. at 1094; *see Sweeney*, 711 F.2d at 1185. A hiring decision motivated by an employer's desire to minimize employee "downtime" during a particularly busy period is, without question, a legitimate business decision. With some objective measure for the comparison, so is the decision that one potential employee possesses superior ability and is better qualified than another. *See Knight* v. *Nassau County Civil Serv. Comm'n,* 649 F.2d 157, 161 (2d Cir.1981) (an employer must present "objective competent evidence" of qualification and "may not use wholly subjective and unarticulated standards to judge employee performance for purposes of promotion"). Consequently, the Department discharged its burden of producing a legitimate, nondiscriminatory for its actions.

III

Next, we consider whether the reasons given by the Department were pretextual. Under Article V, § 6 of the New York State Constitution, "[a]ppointments and promotions in the civil service of the state ... shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable shall be competitive." Here appellant unlike the provisional appointees had passed the required civil service examination. Because passing the examination is a prerequisite to permanent appointment as a principal fiscal analyst, he was in at least one critical respect better qualified than those retained as provisionals. Beyond this the Department conceded at trial that appellant had attained a higher level of education and had greater accounting related work experience than any of the provisionals.

Moreover, the Department's contention that appellant's lack of experience in the Reimbursement Bureau made him less able than the retained provisionals is severely undercut by Bureau Director Gormley's evaluation of Ibrahim sent in a letter to the affirmative action coordinator:

> Mr. Ibrahim demonstrated that he possessed the necessary qualifications and capabilities to perform these functions. His background and manner in which he conducted himself was most impressive....
>
> . . . . .
>
> It is the opinion of the interviewers that Mr. Ibrahim is a definite asset to the staff of

[the Office of Health Systems Management]....

With respect to the claimed institutional benefits of retaining current employees, we recognize that incidental costs are associated with training an individual to perform a new job, but the record reveals that the Department was willing to bear these costs in connection with its decision to promote seven of the 13 individuals whose names appeared on the first eligibility list. No proof presented by the Department provides a reason why re-training costs would be greater in Ibrahim's case. In addition, the suggestion that substantial costs would have been incurred by the necessity of training him as a principal fiscal analyst ignores the fact that Ibrahim was simply seeking promotion from one accounting-related position to another within the same department.

The partial explanation provided by Kevin Wemett, the former Assistant Director of the Reimbursement Bureau that, after Ibrahim's second interview, the Bureau was about to embark on a "rate setting scheme" and because of time constraints would benefit from retaining experienced employees is more of an excuse than a reason. The testimony regarding time constraints for the rate- setting project rings hollow because it focuses on the Bureau's work environment at only one point during the more than two years during which appellant sought promotion to the grade 27 position.

Similarly--under an admittedly perfunctory examination--the Department's claimed goal of preventing employee dislocation by retaining its provisionals reveals pretext. Ibrahim's uncontroverted testimony indicated that during his second interview he was told that if he were

promoted, the provisional employee who had previously filled his position would serve under him. There was no evidence that the provisionals would be fired or asked to leave the Reimbursement Bureau should a permanent appointment be made. Instead, the only dislocation threatened was a return of these employees to their original jobs. Consequently, there was no evidence that appointment of appellant would have prejudiced the Bureau's institutional efficiency.

IV

As previously noted, "Burdine made it plain that in addition to directly proving a discriminatory motive ..., a plaintiff may prevail upon a showing ... that the reason supplied was not the true reason for the unfavorable employment decision." *Dister*, 859 F.2d at 1113. The theory that underlies this system of proof relies, at least in part, on the observation that "those who can demonstrate no legitimate reason for acting more likely than not acted for a discriminatory reason." *Id.* We are here persuaded that appellant--by clearly demonstrating the pretextual nature of the Department's proffered explanation--met his ultimate burden of persuasion and should prevail in his Title VII claim.

The trial court found that Ibrahim did not establish a cause of action under Title VII notwithstanding its implied findings that the Department's proffered reasons were patently pretextual. In explaining its conclusion, the court acknowledged that "[t]he [hiring] decision was not ... totally on the merits" but because the Department "favored the provision[als.]" This explanation is insufficient to convince us that appellant thereby did not prove he was discriminated against, particularly where he has demonstrated

that all the proffered reasons were pretextual. Despite its finding of pretext, the brief two and one-half page oral disposition by the district court judge of appellant's Title VII cause of action contains no analysis or reasons for its conclusion that there was no discrimination.

The finding of the district court was that there was a failure to hire the most qualified, most experienced person who passed the civil service examination while the overtime provisionals were either ineligible or had failed it. This pointed to discrimination based on national origin which was not negated by the Department officials. Unexplained by any reason given by the district court, its finding that there was no Title VII discrimination is clearly erroneous and justifies reversal of the judgment.

CONCLUSION

Accordingly, we reverse the judgment of the district court and remand this case for a determination of damages. The damages available under Title VII include equitable relief and back pay, *see* 42 U.S.C. § 2000e-5(g), and reasonable attorneys' fees, *see id.* § 2000e-5(k). Because no additional relief would be available to appellant under the ADEA, we need not address the district court's denial of j.n.o.v. on that issue.

Reversed and remanded.

Dated: May 25, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SHAWKI R. IBRAHIM,

Plaintiff,

v.

NEW YORK STATE DEPARTMENT OF HEALTH, OFFICE OF HEALTH SYSTEMS MANAGEMENT,

Defendant.

----------X

No. CV 82-0177

MEMORANDUM AND ORDER

DEARIE, District Judge.

Plaintiff moves for judgment notwithstanding the verdict under Fed.R.Civ.P. 50(b) or, in the alternative, for a new trial under Fed.R.Civ.P. 59. Both motions are denied.

Plaintiff's argument for judgment notwithstanding the verdict is based entirely upon plaintiff's view of the credibility of certain witnesses and the weight that should have been attached to their testimony. Issues of credibility and weight of the evidence, of course, are uniquely for the trier of fact. *Korte* v. *N.Y.N.H.H. Ry. Co.*, 191 F.2d 86, 88 (2d Cir.1951). Here, plaintiff may have proven, as he contends, that defendant violated the civil service law and defendant's own affirmative action policies. Neither of those facts suffices to establish a claim of age

discrimination. Plaintiff did establish a prima facie case of discrimination as defined in *Geller* v. *Markham*, 635 F.2d 1027, 1032 (2d Cir.1980); *see McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Had he not, his case would not even have reached the jury. However, the jury credited defense testimony regarding the non- discriminatory reason for not promoting Mr. Ibrahim. The Court cannot say that this decision could not have been reached by "reasonable and fair minded" jurors, or that it "could only have been the result of sheer surmise and conjecture." *Haskell* v. *Kaman Corp.*, 743 F.2d 113, 120 (2d Cir.1984). Thus, the motion for judgment notwithstanding the verdict under Rule 50(b) is denied.

In his motion for a new trial, plaintiff argues that his speech was hindered at trial by a medical condition, which made it difficult for the jury to understand his testimony and thus deprived him of a fair trial. There is no doubt that Mr. Ibrahim did exhibit occasional difficulty in enunciation while testifying at trial. However, he was encouraged to speak slowly and to repeat answers as necessary until he was understood. Certainly this Court, in its role as finder of fact on the Title VII claim, had no difficulty comprehending Mr. Ibrahim's testimony. The Court's observations of the jury and the court reporter do not support Mr. Ibrahim's claim that he could not be understood and he therefore did not receive a fair trial. And, it can hardly be said that the verdict was a miscarriage of justice. *See Bevevino* v. *Saydjari*, 574 F.2d 676, 684 (2d Cir.1978). Plaintiff's motion for a new trial under Rule 59 is denied.

As the Court noted in the course of reaching a verdict in favor of defendant on plaintiff's Title VII claim, Mr. Ibrahim is an intelligent and educated man who feels sincerely wounded as a result of being denied a position for

which he was qualified, perhaps overqualified. Nonetheless, the evidence did not establish to this Court's satisfaction that Mr. Ibrahim was a victim of discrimination based upon his Arab descent or Egyptian national origin, nor to the jury's satisfaction that he was a victim of age discrimination. Ample evidence in the record supports the findings of both the jury and the Court.

SO ORDERED.

Dated: April 6, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Shawki R. IBRAHIM,

Plaintiff,

v.

NEW YORK STATE DEPARTMENT OF HEALTH, OFFICE OF HEALTH SYSTEMS MANAGEMENT,

Defendant.

: No. CV 82-0177 (RJD)

: **MEMORANDUM AND ORDER**

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Lloyd Somer, New York City, for plaintiff.

Charles F. Sanders, Asst. Atty. Gen., New York City, for defendant.

DEARIE, District Judge.

Plaintiff moves to amend his complaint to add a cause of action for race discrimination under 42 U.S.C. § 1981, in light of *St. Francis College* v. *Al-Khazraji*, 481 U.S. 604, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987). Defendant opposes that motion on the grounds that (1) the Eleventh Amendment to the United States Constitution bars suit under 42 U.S.C. § 1981 against the defendant agency of New York State, *see Daisernia* v. *New York*, 582 F.Supp. 792 (N.D.N.Y.1984), and (2) that the proposed Section 1981 claim is barred by the *res judicata* effect of the "no probable cause"

finding issued against Ibrahim by the State Division of Human Rights, *see University of Tennessee* v. *Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986); *DeCintio* v. *Westchester County Med. Center*, 821 F.2d 111 (2d Cir.), *cert. denied*, — U.S. ----, 108 S.Ct. 455, 98 L.Ed.2d 395 (1987). Defendant further cross-moves to amend its answer to include the claim preclusion defense against plaintiff's age discrimination claim brought under 29 U.S.C. § 621 *et seq.*, and for judgment on the pleadings on that claim, in light of *DeCintio*.

It appears that neither the Supreme Court nor the Second Circuit has squarely decided the applicability of Eleventh Amendment immunity to actions pursuant to 42 U.S.C. § 1981. *Cf. Kirkland* v. *New York State Dept. of Correctional Servs.*, 520 F.2d 420 (2d Cir.1975) (affirming certain relief granted against state under Section 1981 without discussing possible immunity), *cert. denied*, 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976). Numerous district courts and at least one court of appeals have addressed this issue, however. Judge McCurn's particularly thorough analysis in *Daisernia* acknowledged a "weighty argument that Congress, in enacting Section 1981, intended to override the sovereign immunity of the states," 582 F.Supp. at 802. Judge McCurn concluded, however, that the logic of *Quern* v. *Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), compelled application of Eleventh Amendment immunity to Section 1981 claims.

The Court adopts *Daisernia*'s analysis of Section 1981's history, but is uncertain about *Daisernia*'s conclusion. Given the statute's background, claims under Section 1981 may be distinguishable from the claims barred in *Quern and Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985); instead, Section 1981 may be

more closely analogous to the statutes involved in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (Title VII of Civil Rights Act of 1964) and *Hutto* v. *Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) (42 U.S.C. § 1988), than to Section 1983 as analyzed in *Quern*. This Court thus might very well decline to apply Eleventh Amendment immunity to claims asserted against states pursuant to 42 U.S.C. § 1981.

However, this difficult constitutional issue need not be decided at the present time, because plaintiff's proposed Section 1981 claim founders upon a non-constitutional shoal. *Elliott* and *DeCintio*, *supra*, establish that facts found in adjudications of Section 1981 claims by state administrative agencies have preclusive effect on subsequent efforts to relitigate the same claims in federal court. There is no question here that the essence of plaintiff's claim--though styled a claim for discrimination against him based on his Arab descent rather than his Egyptian national origin--was brought before the New York State Division of Human Rights (SDHR) and the erstwhile appellate agency, the New York State Human Rights Appeal Board (SHRAB).

Plaintiff contends that he did not have a "full and fair opportunity" to litigate his claim in the state agencies. He argues that he proceeded pro se in the administrative adjudication, was denied a judicial style hearing, and was ruled against on the basis of an incomplete record. The Court is unconvinced, however, that plaintiff has met his burden of "establishing that he did not have a full and fair opportunity to litigate," *DeCintio*, 821 F.2d at 118 (emphasis added). The informal nature of SDHR's investigatory and adjudicatory procedures does not prevent SDHR determinations from having preclusive effect. *Id.* at 117; *Kirkland* v. *City of Peekskill*, 828 F.2d 104, 107-109 (2 Cir.1987). The cases relied on by

plaintiff, notably *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982), and *Bottini* v. *Sadore Mgt. Corp.*, 764 F.2d 116 (2d Cir.1985), all predate both *Elliott* and *DeCintio*. Furthermore, *Bottini* involved a claim brought under Title VII, 42 U.S.C. § 2000e *et seq.* Because of the statutory requirement that Title VII claims be subjected to administrative scrutiny before they are brought in federal court, such claims have been protected from preclusion by administrative findings. *Elliott*, 106 S.Ct. at 3223-25; *DeCintio*, 821 F.2d at 114-15. The same is not true for Section 1981 claims.

The Court concludes, because plaintiff has not shown that he lacked a full and fair opportunity to press his claim before SDHR and SHRAB, that any Section 1981 claim would be precluded by the administrative finding of no probable-cause. Thus the Section 1981 claim, if added to the complaint, would inevitably be dismissed. Therefore, denial of leave to amend the complaint is appropriate. *Wilder* v. *Thomas*, 659 F.Supp. 1500 (S.D.N.Y.1987); see *Foman* v. *Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

Defendant asks the Court also to apply preclusive effect to the administrative agencies' determinations that there was no probable cause to believe that plaintiff was discriminated against because of his age. The Court declines to do so. The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, conditions the right to sue in federal court on prior filing of a charge with the Equal Employment Opportunity Commission or an appropriate state agency. 29 U.S.C. § 626(d). The requirement is not dissimilar to Title VII's. 42 U.S.C. § 2000e-5(f). The Court, therefore, concludes that age discrimination claims, like Title VII claims, and unlike claims under the Reconstruction Civil Rights Acts,

are not precluded by state administrative adjudications that are unreviewed by a state court. This Court thus agrees with *Duggan* v. *Board of Education*, 818 F.2d 1291 (7th Cir.1987) and *Rosenfeld* v. *Dept. of the Army*, 769 F.2d 237 (4th Cir.1985), and disagrees with *Stillians* v. *Iowa*, 843 F.2d 276 (8th Cir.1988).[1] The Second Circuit has apparently not yet addressed the question raised by defendant's motion.

For the reasons stated above, plaintiff's motion to amend the complaint is denied. Defendant's motion to amend the answer, and for partial judgment on the pleadings, is also denied.

SO ORDERED.

Dated: August 16, 1988

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[1] On a closely related issue, the Eleventh and Ninth Circuits have held that age discrimination suits were not precluded by state agencies' determinations that the plaintiffs were ineligible for unemployment benefits. *Delgado* v. *Lockheed-Georgia Co.*, 815 F.2d 641, 646-47 (11th Cir.1987); *Mack* v. *South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282-84 (9th Cir.1986). In *Delgado*, the court reasoned that an unemployment insurance agency is an inappropriate forum for determining age discrimination claims, and explicitly declined to decide whether rulings by a state agency "charged with the enforcement of state age discrimination laws" might have preclusive effect. *Mack* held that the unemploymentinsurance agency had not provided an adequate opportunity to litigate the claim of age discrimination. *Mack* strongly implied that had the state agency afforded adequate opportunity to litigate, the agency's determination would have had preclusive effect. To the extent that *Mack* so held, this court disagrees with *Mack* as well.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SHAWKI R. IBRAHIM,

Plaintiff,

v.

NEW YORK STATE DEPARTMENT OF HEALTH, OFFICE OF HEALTH SYSTEMS MANAGEMENT, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, NEW YORK STATE DEPARTMENT OF AUDIT AND CONTROL, NEW YORK STATE DIVISION OF HUMAN RIGHTS, PUBLIC EMPLOYEES FEDERATION UNION AFL-CIO,

Defendants.

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No. 82 Civ. 0177.

MEMORANDUM AND ORDER

McLAUGHLIN, District Judge.

This is an action for employment discrimination on the basis of age, race, and national origin in violation of 42 U.S.C. §§ 2000e-2(a) & 3(a) ("Title VII") and 42 U.S.C. §§ 1981 & 1983. Plaintiff also asserts pendent state claims under N.Y. Executive Law § 296(1)(a) & (e) (McKinney 1982). In addition to injunctive relief, plaintiff seeks $175,000 as back pay, compensatory, and

punitive damages as well as attorney's fees under 42 U.S.C. § 1988. The New York State Department of Health, Office of Health Systems Management, the New York State Department of Civil Service, the New York State Department of Audit and Control, and the New York State Division of Human Rights (the "State defendants") move for summary judgment[1] Fed.R.Civ.P. 56. For the reasons developed below, the motion is granted in part and denied in part.

FACTS

Plaintiff, a 63 year old male citizen of the United States, is an ethnic Arab who was born in Egypt. Since 1979, defendants have failed to promote him to the position of Principal Health Care Fiscal Analyst ("PHCFA" or "fiscal analyst"), civil service grade 27, even though he successfully passed the appropriate New York State Civil Service examination and is on the Civil Service list for that position. In February, 1980, plaintiff filed an administrative complaint alleging that his failure to be selected for a PHCFA position was the result of discrimination. This was the first in a series of administrative complaints, all of which have been rejected.

In March, 1983, plaintiff was advised that he was being reassigned from New York City to Albany, without promotion, due to job consolidations required by State budget deficits. Plaintiff alleges that he will lose his job if he refuses to relocate, and that the relocation is in retaliation for filing complaints of discrimination. After he

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[1] Defendant Public Employees Federation Union, AFL-CIO has neither filed an answer to plaintiff's claim for inadequate representation nor has it joined in these motions for summary judgment.

was informed of his reassignment, plaintiff filed an administrative complaint on the additional ground of retaliation. That claim has not yet been fully adjudicated on the administrative level.

In December, 1978, the Department of Civil Service ("Civil Service") certified a list of persons who had passed an open-competitive examination, making them eligible for PHCFA positions.[2] Of the persons listed, plaintiff and three others received a grade of 70%, the lowest passing score. Some of the passing applicants subsequently declined to be interviewed for the position by the defendant State Department of Health ("DOH"), Office of Health Systems Management ("OHSM"). Other applicants either retired or declined to be considered after interviews. In February, 1979, several of those applicants remaining on the list were appointed as PHCFA's, leaving only two candidates, the plaintiff and Mr. Joseph Culpo, for subsequent openings.

The appointing DOH, OHSM officer, relying on New York State Civil Service Law § 61, exercised what he alleges to be his discretionary option not to select from a list of fewer than three candidates and to await the results of a new examination.[3] He chose instead to retain, on a

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[2] The parties' Local Rule 3(g) statements reflect a dispute as to the actual number of applicants who were eligible for the position sought by plaintiff. Plaintiff contends that there were twenty-one candidates, while defendants state that there were twenty-two. Neither side has briefed the materiality of this factual dispute.

[3] N.Y.Civ.Serv.Law § 61 (McKinney 1983) provides in part:

(continued...)

provisional basis, two employees who were temporarily serving as PHCFA's, as well as a third person from within the bureau.

Defendants assert that Mr. Gormley, the Director of the DOH Bureau of Residential Health Care Facility Reimbursement ("RHCFR"), retained the three employees because they were already functioning members of the bureau, and because their competence was not in question. Plaintiff and Mr. Culpo, on the other hand, were viewed as candidates of "unknown quality." Affidavit of William J. Gormley, at ¶ 7 (June 2, 1983).

DISCUSSION

1. 42 U.S.C. § 1981

Plaintiff alleges that defendants' failure to promote him constitutes a violation of 42 U.S.C. § 1981, which provides, inter alia, that all persons within the United States shall enjoy the same rights and benefits of law as are "enjoyed by white citizens." Defendants argue that this bars discrimination based upon race, but does not address discrimination based upon national origin. Plaintiff concedes the distinction but characterizes the Arab ethnic group, of which he is a member, as a "race." I disagree.

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[3] (...continued)

1. Appointment or promotion from eligible lists. Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion....

In a similar case of alleged employment discrimination *Budinsky* v. *Corning Glass Works*, 425 F.Supp. 786 (W.D.Pa.1977), the court dismissed a Slavic plaintiff's § 1981 claim of racial discrimination holding that "Title VII ... provides a thorough remedy for victims of employment discrimination based on ... national origin." *Id.* at 789. The court reasoned that:

> The terms "race" and "racial discrimination" may be of such doubtful sociological validity as to be scientifically meaningless, but these terms nonetheless are subject to a commonly-accepted, albeit sometimes vague, understanding. . . . On this admittedly unscientific basis, whites are plainly a "race" susceptible to "racial discrimination." Hispanic persons and Indians, like blacks, have been traditional victims of group discrimination, and, however inaccurately or stupidly, are frequently and even commonly subject to a "racial" identification as "non-whites." . . . .
>
> The same cannot be said with respect to persons of Slavic or Italian or Jewish origin. These groups are not so commonly identified as "races" nor so frequently subject to that "racial" discrimination which is the specific and exclusive target of § 1981.

425 F.Supp. at 788.

Dealing specifically with a plaintiff of Arab origin, the court in *Saad* v. *Burns Intern. Sec. Services, Inc.*, 456 F.Supp. 33, 37 (D.D.C.1978), dismissed the plaintiff's

§ 1981 claim on its finding that "[Section 1981] is directed solely at discrimination based on race and color" and that plaintiff's classification of himself as "non-Caucasian" was "insufficient for purposes of a claim of racial discrimination."

Accordingly, plaintiff has failed to state a claim under § 1981, and that claim is dismissed.

2. 42 U.S.C. § 1983

Plaintiff also alleges that the actions of the various agencies and departments of the State of New York named as defendants herein give rise to a claim for damages under 42 U.S.C. § 1983. Defendants counter that as departments of the State of New York they are immune from suits under § 1983 by virtue of the Eleventh Amendment.

Monell v. *Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) held that the Eleventh Amendment permits § 1983 suits against municipalities under certain circumstances. The Supreme Court, however, sanctioned suits only against "local government units which are not considered part of the State for Eleventh Amendment purposes."[4] 436 U.S. at 690,

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[4] No similar limitation exists with respect to plaintiff's Title VII claims. The Supreme Court has held that Title VII suits against States or State officials are not barred by the Eleventh Amendment. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). Congress enacted the 1972 Amendments to Title VII pursuant to its authority under Section 5 of the Fourteenth Amendment in order to enforce "by appropriate legislation" the substantive provisions of that Amendment. The principle of state sovereignty embodied in

(continued...)

n. 54, 98 S.Ct. at 2035, n. 54. The four named New York State agencies in this case are clearly "part of the State." Thus, plaintiff's § 1983 suit against them must be dismissed.

3. Title VII (42 U.S.C. § 2000e-2(a))

Plaintiff alleges that the DOH, OHSM's refusal to promote him to the position of fiscal analyst was based upon the fact that he is an Egyptian Arab. Section 2000e-2 of Title VII provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... national origin; or
>
> (2) to limit ... or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... national origin.

42 U.S.C. § 2000e-2(a)(1) & (2).

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[4] (...continued)
the Eleventh Amendment is necessarily limited by the enforcement provisions "of a constitutional amendment whose other sections by their own terms embody limitations on state authority." *Id.* at 456, 96 S.Ct. at 2671.

In *McDonnell Douglas* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court described the burden of proof in a Title VII case as follows:

> (1) Plaintiff has the initial burden of establishing a prima facie case of discrimination; (2) if plaintiff succeeds in establishing a prima facie case, the burden shifts to the employer to "articulate some legitimate non- discriminatory reason" for the non-selection of plaintiff; and (3) if the employer does articulate such a reason, the burden shifts back to the plaintiff to prove that the reason given by the employer is not really legitimate and nondiscriminatory but is merely pretextual. *Id.* at 802-04, 93 S.Ct. at 1824-1825.

Here, plaintiff has succeeded in presenting a prima facie case by demonstrating that (1) he is within a class protected by § 2000e-2(a); (2) he applied for and was qualified for a job the DOH, OHSM was trying to fill; (3) he was denied the job despite his qualifications; and (4) the DOH, OHSM continued to seek applicants for the position. *Id.* at 802, 93 S.Ct. at 1824.

In rebuttal, the DOH, OHSM alleges that there were two reasons why, instead of promoting plaintiff, it retained the three provisional fiscal analysts pending new test results: (1) the director decided to exercise his option to choose from a list of at least three qualified applicants; and (2) the retained employees had all worked with the director, and he had confidence in their abilities. In *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254-55, 101

S.Ct. 1089, 1094-1095, 67 L.Ed.2d 207 (1981), the Court stated that the defendant's rebuttal burden is only the burden of explaining clearly the non-discriminatory reasons for its actions. I am satisfied that they have done this.

The burden of going forward thus reverts to plaintiff who must prove that the reasons articulated by the DOH, OHSM are merely pretextual. Here we encounter serious questions of credibility.

For example, Mr. Gormley, the Assistant Director of the Division of Health Care Financing, stated in his affidavit that:

> The central question presented in this case is the motivation behind my decision not to demote Mr. Malecki or Mr. Marshall and to appoint Mr. Higgitt [the provisional analysts]. Plaintiff asserts that my decisions were based on some prejudice concerning him--his race and/or age and/or national origin. Nothing could be further from the truth. I can state emphatically and without reservation that considerations of plaintiff's race, age or national origin played no part in my decision.

Affidavit of William J. Gormley, at ¶ 7 (June 2, 1983).

Although the record contains a wealth of circumstantial evidence tending to support Mr. Gormley's denial, his credibility on this crucial issue creates an issue that may not be resolved on a motion for summary judgment. In attempting to demonstrate that the DOH, OHSM's explanations are pretextual, plaintiff should be allowed to probe Mr. Gormley's motivation at trial. Moreover, the trier

of the facts should be afforded an opportunity to observe the witness' demeanor, particularly under cross-examination. *See, e.g., Cross* v. *United States*, 336 F.2d 431, 433 (2d Cir.1964). Accordingly, defendants' motion to dismiss plaintiff's claim under 42 U.S.C. § 2000e-2(a) is denied.

4. Title VII (42 U.S.C. § 2000e-3(a))

Plaintiff's claim under this section of Title VII rests upon his allegation that the DOH, OHSM's decision to transfer him from New York City to Albany was in retaliation for plaintiff's filing charges concerning the DOH, OHSM's failure to promote him to the position of fiscal analyst. Section 2000e-3(a) expressly prohibits such retaliation. Defendants, however, argue that the Court lacks subject matter jurisdiction over the retaliation claim because plaintiff, by his own admission, has not yet exhausted his administrative remedies with respect to that claim.

Generally, Title VII claims, unlike claims under 42 U.S.C. §§ 1981 and 1983, cannot be heard in federal court until the plaintiff has exhausted all administrative remedies. *See Love* v. *Pullman Co.*, 404 U.S. 522, 523, 92 S.Ct. 616, 617, 30 L.Ed.2d 679 (1972); *Dennis* v. *Blount*, 497 F.2d 1305, 1309 (9th Cir.1974). Only when pursuit of those remedies would be futile may a plaintiff by-pass them. *Chance* v. *Board of Examiners*, 70 F.R.D. 334, 337 (S.D.N.Y.1976). Moreover, administrative exhaustion of a retaliation claim is required notwithstanding the close relationship of that claim to an underlying claim for employment discrimination under § 2000e-2(a) as to which a plaintiff has exhausted his administrative remedies. *See Bickley* v. *University of Maryland*, 527 F.Supp. 174 (D.Md.1981).

Because relief is available to plaintiff at the administrative level, the retaliation claim must be dismissed for lack of jurisdiction.

5. N.Y. Executive Law § 296(1)(a) & (e)

Section 296(1)(a) of New York's Executive Law (prohibiting discriminatory employment practices) is the State counterpart of 42 U.S.C. § 2000e-2(a). Section 296(1)(e) of the Executive Law (prohibiting employer retaliation) is the State counterpart to 42 U.S.C. § 2000e-3(a). These State law causes of action are pleaded under principles of pendent jurisdiction. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

Defendants' argue that dismissal of all federal claims would divest the Court of its pendent jurisdiction over plaintiff's State causes of action. Because I have denied the motion to dismiss plaintiff's Title VII claim for employment discrimination under 42 U.S.C. § 2000e-2(a), however, pendent jurisdiction exists with respect to that claim's State counterpart under N.Y.Exec.Law § 296(1)(a).[5]

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[5] Although plaintiff has alleged a claim for employment discrimination based upon age, the second amended complaint does not refer to 29 U.S.C. § 623(a) (prohibiting age discrimination by employers). Nevertheless, N.Y.Exec.Law § 296(1)(a) encompasses age discrimination among its prohibitions. Accordingly, that claim is also before the Court. I find that plaintiff has met his burden, though barely so, under Fed.R.Civ.P. 56(e) by demonstrating that there exist material issues of fact with respect to his claim for age discrimination. Therefore, defendants' motions for summary judgment are denied as to that claim.

Because I have dismissed plaintiff's federal retaliation claim under 42 U.S.C. § 2000e-3(a) for failure to exhaust administrative remedies, however, I deem it prudent to decline to exercise pendent jurisdiction over the corresponding State cause of action under N.Y.Exec.Law § 296(1)(e) until the federal claim is ripe. Accordingly, defendants' motion to dismiss is denied as to plaintiff's cause of action under N.Y.Exec.Law § 296(1)(a) but is granted as to plaintiff's retaliation claim under N.Y.Exec.Law § 296(1)(e).

6. Proper Defendants

The State defendants argue that plaintiff has failed to state a cause of action upon which relief can be granted as against (1) the New York State Department of Civil Service; (2) the New York State Division of Human Rights; and (3) the New York State Department of Audit and Control.

Upon searching the record, I conclude that plaintiff has failed to address this issue adequately. He has presented no relevant law or convincing arguments demonstrating the propriety of joining these agencies as co-defendants on those claims that have survived this motion for summary judgment. Accordingly, all claims that pertain to those defendants are dismissed. *See* Fed.R.Civ.P. 19. The proper State defendant is the DOH, OHSM.

CONCLUSION

The State defendants' motions for summary judgment are granted with respect to all claims except plaintiff's claims under 42 U.S.C. § 2000e-2(a) and

N.Y.Exec.Law § 296(1)(a) for discriminatory employment practices by the DOH, OHSM.

SO ORDERED.

Dated: January 26, 1984

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of April, one thousand nine hundred and ninety nine.

Present:

Hon. Pierre N. Leval
Hon. Rosemary S. Pooler
Hon. Gerald W. Heaney*

CIRCUIT JUDGES

Ibrahim,

Plaintiff-Appellant,

v. Docket No. 98-7709

N.Y.S. Dept. of Health,

Defendant-Appellee.

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* The Hon. Gerald W. Heaney of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

A petition for panel rehearing having been filed herein by Shawki R. Ibrahim,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
CAROLYN CLARK CAMPBELL,
Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SHAWKI R. IBRAHIM,

Plaintiff,

82 Civ. 0177 (RJD)

-against-

NOTICE OF APPEAL

NEW YORK STATE DEPARTMENT OF HEALTH, *et al.*,

Defendant.

Notice of Appeal to the United States Court of Appeals for the Second Circuit

SIR:

PLEASE TAKE NOTICE, that the Plaintiff in the within action, SHAWKI R. IBRAHIM, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment of this Court, dated the 15th day of April, 1998 and entered on the 20th day of April, 1998, and from each and every part of same including, but not limited to the trial Court's calculation of damages; and from certain decisions and orders of the District Court preceding the entry of said judgment including, but not limited to, the decision and order of Hon. Raymond J. Dearie, dated January 20, 1995; the

Dearie dated December 13, 1996 and the decision and order of Hon. Raymond J. Dearie dated February 24, 1998. The plaintiff appeals from each and every part of the aforesaid orders.

Dated: New York, New York
May 12, 1998

/s/ Charles M. Powell, Jr.
Charles M. Powell, Jr., Esq.
(CP-4176)
Charles M. Powell, Jr. & Associates
Attorneys for Plaintiff
111 Broadway, 6th Floor
New York, New York 10006
(212) 608-1893

TO: Clerk of the United States
District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11203

Charles F. Sanders
Assistant Attorney General
Attorney for Defendants
Office of the Attorney General
State of New York
120 Broadway, 24th Floor
New York, New York 10271

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

SHAWKI R. IBRAHIM,

Plaintiff, 82 Civ. 177 (RJD)

-against-

JUDGMENT

NEW YORK STATE
DEPARTMENT OF HEALTH,
et al.,

Defendant.

----------x

This action having come on for trial on remand from the United States Court of Appeals for the Second Circuit ("Second Circuit"); the Second Circuit having determined that the plaintiff's rights as guaranteed by Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"), had been violated by the defendant and, as a result of that determination, ordered the District Court to conduct a trial so as to afford plaintiff damages and the full scope of equitable relief as required and/or mandated by Title VII; and a trial on damages having been held on April 12th and 13th, 1993, the Hon. Raymond J. Dearie presiding; and the issue of damages having been tried, and a decision having been rendered on January 20, 1995; and the plaintiff having filed on September 14, 1995, a motion for a new trial pursuant to Fed. R. Civ. P. 59, and the Court having denied plaintiff's motion in all respects in a decision dated June 17, 1996; and the Court having issued a Memorandum and Order

with respect to back pay and the method for calculating interest on back pay; and the Court, upon application of the plaintiff, having conducted an additional post-trial hearing on damages on November 10, 1997 wherein the plaintiff presented the expert testimony of Harvey R. Kelly of Price Waterhouse, LLP and the Court having received the report of the expert as an exhibit; and the Court having issued a Memorandum and Order, on the issue of damages, dated February 24, 1998 wherein it ordered that the parties settle a judgment on notice; and the parties having conferred and exchanged mathematical calculations without being able to resolve certain mathematical differences,

IT IS ORDERED AND ADJUDGED, that plaintiff's motion for a new trial pursuant to Fed. R. Civ. P. 59 is denied in its entirety, and,

IT IS FURTHER ORDERED AND ADJUDGED, that plaintiff, SHAWKI IBRAHIM, recover of the defendant, NEW YORK STATE DEPARTMENT OF HEALTH, damages, in the form of back pay in the amount of Ninety-One Thousand One Hundred Forty Six ($91,146.00) dollars, together with interest, calculated pursuant to 26 U.S.C. § 6621, compounded annually through April 30, 1998, in the amount of Two Hundred Thirty Six Thousand Six Hundred Fifteen ($236,615.00) dollars, for a total of sum of damages for undercompensated wages and interest in the amount of Three Hundred Twenty Seven Thousand Seven Hundred Sixty One ($327,761.00) dollars, and,

IT IS FURTHER ORDERED AND ADJUDGED, that the plaintiff is entitled to receive compensation, for 25 personal days devoted by him to this litigation. The plaintiff shall, therefore recover from the defendant, for the 25

personal days in question, the sum of Five Thousand Two Hundred Twenty Four ($5,224.00) dollars, and,

IT IS FURTHER ORDERED AND ADJUDGED, that the plaintiff is entitled to, and shall recover of the defendant, the total amount of damages for undercompensated wages (back pay); interest on undercompensated wages and 25 personal days, damages in the amount of Three Hundred Thirty Two Thousand Nine Hundred Eighty Five ($332,985.00) dollars, and

IT IS FURTHER ORDERED AND ADJUDGED, that the plaintiff is entitled to, and shall recover of the defendant, compensation for the negative tax impact, or consequences associated with receiving the lump sum payment of $332,985.00, additional monetary damages in the amount of Two Hundred Forty Seven Thousand Two Hundred and Twenty Four ($247,224.00) and,

IT IS FURTHER ORDERED AND ADJUDGED, that each attorney who represented plaintiff, and formally appeared before this Court, during the course of this litigation, shall forward his application, if any, for payment of reasonable attorney fees, and reimbursement of out of pocket expenses, setting forth any and all moneys received from the plaintiff, SHAWKI IBRAHIM, for fees or reimbursement of disbursements, to the defendant NEW YORK STATE DEPARTMENT OF HEALTH'S Legal Counsel, in accordance with Section V(B) of the Eastern District's Civil Justice Expense and Delay Reduction Plan and the defendant, NEW YORK STATE DEPARTMENT OF HEALTH, shall pay directly to plaintiff, SHAWKI IBRAHIM, after deducting from the fees expenses awarded to each applicant, an amount equal to that paid to each such applicant by plaintiff SHAWKI IBRAHIM, and

IT IS FURTHER ORDERED AND ADJUDGED, that plaintiff, SHAWKI IBRAHIM, shall forward his application to the Court for reimbursement of attorney fees for those attorneys who do not make application for reimbursement of services rendered in this litigation and costs and expenses incurred by plaintiff during the course of this litigation and the defendant . NEW YORK STATE DEPARTMENT OF HEALTH, shall pay directly to plaintiff that sum, relating to his application, as approved by the Court, and,

IT IS FURTHER ORDERED AND ADJUDGED, that the defendant, NEW YORK STATE DEPARTMENT OF HEALTH, within fifteen (15) days of its receipt of this duly entered judgment, shall pay to the plaintiff, SHAWKI IBRAHIM, total damages in the amount of Five Hundred Eighty Thousand Two Hundred Nine ($580,209.00) dollars as well as payment for plaintiff's legal fees and costs to be determined by this Court.

Dated: New York, New York
April 14, 1998

RAYMOND J. DEARIE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

SHAWKI R. IBRAHIM, :

Plaintiff, : **CROSS-NOTICE OF SETTLEMENT**

: 82 Civ. 0177 (RJD)

-against- :

NEW YORK STATE DEPARTMENT OF HEALTH, *et al.*, :

Defendants. :

----------X

S I R:

PLEASE TAKE NOTICE that the within Judgment and affidavit of Charles F. Sanders, sworn to on April 9, 1998, will be presented for settlement and signature to the Hon. Raymond J. Dearie, United States District Judge, United States District Court for the Eastern District of New York, at the United States Courthouse, located at

225 Cadman Plaza East, Brooklyn, New York on the 14th day of April, 1998 at 10:00 A.M.

Yours, etc.,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Defendant DOH
By:

/s/ Charles F. Sanders
CHARLES F. SANDERS
(CFS-3574)
Assistant Attorney General
120 Broadway
New York, New York 10271
(212) 416-8594

TO: CHARLES M. POWELL, JR.
& ASSOCIATES
Attorneys for Plaintiff
111 Broadway, 6th Floor
New York, New York 10006
(212) 608-1893

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SHAWKI R. IBRAHIM,

Plaintiff, 82 Civ. 177 (RJD)

-against-

AFFIDAVIT

NEW YORK STATE
DEPARTMENT OF HEALTH,
et al.,

Defendant.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CHARLES M. POWELL, JR., being duly sworn, deposes and says:

1. I am the attorney for the plaintiff in the within matter. I submit this Affidavit in opposition to the proposed judgment of the defendant and in support of the judgment proposed by the plaintiff.

2. With respect to the calculation of Backpay and Interest, I ask the Court to refer to its own Memorandum and Order of January 20, 1995, wherein, on page 18, the Court stated that... "the interest should be compounded annually rather than daily. Second Circuit case law clearly favors this result." The method of calculation of the plaintiff, with

respect to prejudgment interest is in direct accordance with the aforesaid ruling.

3. The defendant, on the other hand calculates prejudgment interest, through April 1, 1998, on a pay period basis. This method is not supported by the Court's rulings or by other relevant case law. On the other hand, the plaintiff's method of calculating prejudgment interest is supported by *Gelof* v. *Papineau*, 648 F.Supp. 912, 47 FEP 1081 (1987). In this case, the Court indicated that the interest award should be calculated by treating each year's back pay award as a lump sum in the beginning of the year and computing the interest on it until December of that year.

4. This method of computing interest was adopted by Harvey Kelly, the expert witness from Price Waterhouse, LLP. In the cross examination of Mr. Kelly, he testified that he utilized this methodology ironically by referring to an earlier Affidavit in the record of Charles F. Sanders, counsel for the defendant who also utilized the same method as that put forth by plaintiff in its proposed judgment.

5. The plaintiff further requests that the Court, prior to reaching a final determination as to the judgment for the plaintiff, review the case of *EEOC* v. *Kentucky State Police Department*, 80 F.3d 1086 (6th Cir. 1996). In this case, the Circuit Court indicated that the District Court properly refused to deduct from back pay the amount the state troopers would have owed for taxes. The Circuit Court also held that the District Court properly deducted the claimants' net income from their employment rather than their gross earnings. In the within case, taxes were deducted and the offset was on the gross. In addition, if the net income (gross income from other employment with the

payroll tax withheld) is adopted by the Court, the back pay would have been $157,139 with the interest at $525,649.

6. The Court should note that counsel for the defendant, Charles F. Sanders, in an earlier proposed judgment and Affidavit dated November 27, 1996 computed the back pay and interest in the amount of $278,827 which exceeds the amount now proposed by approximately $5,000. When this figure is extended to April 30, 1998 it then becomes $315,319 not $304,770.

7. In its calculation, the defendant used as its principal the sum of $89,800 and not the principal amount of $91,146 as the Court mandated.

8. In submitting the judgment, the plaintiff reserves its rights and takes exception to the Court's rulings in that the Court has not sat as a Court of equity as the case of *Sears* v. *Atchinson Topeka & Santa Fe Ry.*, 749 F.2d 1451 (10th Cir. 1984), 30 FEP cases 1088 indicates. In addition, the plaintiff also takes exception to the rulings of the Court:

a. depriving the plaintiff of pension and Social Security benefits.

b. depriving the plaintiff of a front award from September 27, 1990 to the present.

c. denying the plaintiff the promotion to the position of SG-29 from 1984.

d. denying the plaintiff the unjust enrichment which is part of the interest the employer enjoyed.

e. the reduction of 2% corporate premium of 6621 IRC because the defendant was put on notice from 1990 and continued to invest the back pay and interest at a higher rate.

f. All other rights and claims previously reserved.

WHEREFORE, I respectfully request that the Court sign plaintiff's proposed judgment and grant plaintiff such other relief as the Court may deem just and proper.

/s/ Charles M. Powell, Jr.
CHARLES M. POWELL, JR.

Sworn to before me this
14th day of April, 1998

/s/ Cassandra T. Williams
NOTARY PUBLIC

Cassandra T. Williams
Notary Public, State of New York
No. 02W15085010
Qualified in Westchester County
Commission Expires, Sept. 15, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

SHAWKI R. IBRAHIM,

Plaintiff, 82 Civ. 0177 (RJD)

-against- **AFFIDAVIT**

NEW YORK STATE
DEPARTMENT OF HEALTH,
et al.,

Defendants.

----------X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CHARLES F. SANDERS, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the Office of DENNIS C. VACCO, Attorney General of the State of New York, attorney for defendant New York State Department of Health ("DOH"). I submit this affidavit in opposition to plaintiff's proposed judgment, in support of the counter judgment submitted on behalf of DOH.

Calculation of Backpay and Interest

2. As clearly demonstrated in the affidavit of Gordon Hamilton, sworn to on March 18, 1998 and April 2, 1998, respectively, and the exhibits annexed thereto, and Terri Landen, sworn to on March 18, 1998, the New York State Office of the Comptroller (the "Comptroller") properly calculated the interest on the backpay award.

3. The Comptroller does not use simple interest without compounding in producing the calculations. A review of the spreadsheet, Exhibit "A" to the Hamilton Aff., April 2, 1998, clearly demonstrates that at the beginning of the first pay period of each calendar year the cumulative interest from the prior calendar year is added to the cumulative backpay, as is the interest for the first pay period of that year.

4. Exhibit "A" to the Hamilton Aff. makes reference to the T-Bill Interest Rate the Office of the State Comptroller had earlier received from the Clerk's Office of the United States District Court in Utica and used in prior calculations submitted to the Court. Exhibit A also includes the rate the Court instructed us to use under 28 USC § 6621. The Comptroller included the T-Bill Rate to demonstrate to the Court its good faith in asserting prior calculations.

Negative Tax Impact Calculation

5. As previously stated to the plaintiff and the Court, plaintiff failed to provide our office with any of the underlying information used by his expert to calculate the negative tax impact, including the returns, despite our repeated requests, therefore we do not have any reasonable means to determine the amount.

6. The proposed judgment submitted by DOH is fully consistent with the orders of the Court and the detailed information and materials provided to the Court and plaintiff by the Comptroller. A copy of the proposed judgment is annexed hereto.

WHEREFORE, your deponent respectfully requests that the Court deny plaintiff's proposed judgment and that the Court issue the defendant's proposed judgment, or a judgment similar thereto, which provides plaintiff with a total sum of $557,218.11 as a total backpay award, including an award for a negative income tax impact, and for any other such further relief as this Court deems just.

/s/ Charles F. Sanders
CHARLES F. SANDERS

Sworn to before me this
9th day of April, 1998

/s/
Assistant Attorney General
of the State of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

SHAWKI R. IBRAHIM, :

Plaintiff, :

-against- : **JUDGMENT**

NEW YORK STATE
DEPARTMENT OF HEALTH, *et al.*, : 82 Civ. 0177 (RJD)

:

Defendants.

:

----------X

This action having come on for trial on remand from the United States Court of Appeals for the Second Circuit ("Second Circuit"); the Second Circuit having determined that the plaintiff's rights as guaranteed by Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"), had been violated by the defendant and, as a result of that determination, ordered the District Court to conduct a trial so as to afford plaintiff damages and equitable relief under Title VII; and a trial on damages, including expert testimony on behalf of plaintiff, having been held on April 12 and 13, 1993, the Hon. Raymond J. Dearie presiding; and the issue of damages having been tried, and a decision having been rendered on January 20, 1995; and the plaintiff having filed on September 14, 1995, a motion for a new trial pursuant to Fed. R. Civ. P. 59, and the Court having denied plaintiff's motion in all respects in a decision

dated June 17, 1996; and the Court having issued a Memorandum and Order respecting damages on December 13, 1996 wherein it provided the parties to this litigation with certain parameters with respect to back pay and the method of calculating interest on back pay; and the Court, upon application of the plaintiff, having conducted an additional post-trial hearing on damages on November 10, 1997 wherein the plaintiff presented the expert testimony of Harvey R. Kelly of Price Waterhouse, LLP and the Court having received the report of the expert as an exhibit; and the Court having issued a Memorandum and Order, on the issue of damages, dated February 24, 1998 wherein it ordered that the parties settle a judgment on notice; and the parties having conferred and exchanged mathematical calculations including the affidavits of Gordon Hamilton, sworn to on March 18, 1998 and April 2, 1998, respectively, and the exhibits annexed thereto, and Terri Landin, sworn to on March 18, 1998, and the exhibits annexed thereto, without being able to resolve certain mathematical differences.

IT IS ORDERED AND ADJUDGED, that plaintiff's motion for a new trial pursuant to Fed. R. Civ. P. 59 is denied in its entirety, and,

IT IS FURTHER ORDERED AND ADJUDGED, that plaintiff, SHAWKI IBRAHIM, recover of the defendant, NEW YORK STATE DEPARTMENT OF HEALTH, damages, in the form of back pay in the amount of Ninety-One Thousand One Hundred Forty Six ($91,146.00) dollars, together with interest, calculated pursuant to 26 U.S.C. § 6621, compounded annually through April 30, 1998, in the amount of Two Hundred Thirteen Thousand Six Hundred Twenty Four Dollars and Eleven Cents ($213,624.11), for a total sum of damages for undercompensated wages and interest in the amount of Three Hundred Four Thousand

Seven Hundred Seventy Dollars and Eleven Cents ($304,770.11), and

IT IS FURTHER ORDERED AND ADJUDGED, that the plaintiff is entitled to receive compensation, for 25 personal days devoted by him to this litigation. The plaintiff shall, therefore recover from the defendant, for the 25 personal days in question, the sum of Five Thousand Two Hundred Twenty Four ($5,224.00) Dollars, and

IT IS FURTHER ORDERED AND ADJUDGED, that the plaintiff is entitled to, and shall recover of the defendant, the total amount of damages for undercompensated wages (back pay); interest on undercompensated wages and 25 personal days, damages in the amount of Three Hundred Nine Thousand Nine Hundred Ninety Four Dollars and Eleven Cents ($309,994.11).

IT IS FURTHER ORDERED AND ADJUDGED, that the plaintiff is entitled to, and shall recover of the defendant, compensation for the negative tax impact, or consequences associated with receiving the lump sum payment of $309,994.11, additional monetary damages in the amount of Two Hundred Forty Seven Thousand Two Hundred and Twenty Four Dollars ($247,224.00) and,

IT IS FURTHER ORDERED AND ADJUDGED, that each attorney who represented plaintiff, and formally appeared before this Court, during the course of this litigation, shall forward his application, if any, for payment of reasonable attorney fees, and reimbursement of out of pocket expenses, setting forth any and all moneys received from the plaintiff, SHAWKI IBRAHIM, for fees or reimbursements of disbursements, to the defendant NEW YORK STATE DEPARTMENT OF HEALTH'S Legal

Counsel, in accordance with Section V(B) of the Eastern District's Civil Justice Expense and Delay Reduction Plan and the defendant, NEW YORK STATE DEPARTMENT OF HEALTH, shall pay directly to plaintiff, SHAWKI IBRAHIM, after deducting from the fees expenses awarded to each applicant, an amount equal to that paid to each such applicant by plaintiff SHAWKI IBRAHIM, and

IT IS FURTHER ORDERED AND ADJUDGED, that plaintiff, SHAWKI IBRAHIM, shall forward his application to the Court for reimbursement of attorney fees for those attorneys who do not make application for reimbursement of services rendered in this litigation and costs and expenses incurred and expended by plaintiff during the course of this litigation with documented proof thereof and the defendant NEW YORK STATE DEPARTMENT OF HEALTH, shall pay directly to plaintiff that sum, relating to his application, as approved by the Court, and,

IT IS FURTHER ORDERED AND ADJUDGED, that the defendant NEW YORK STATE DEPARTMENT OF HEALTH, within sixty (60) days of its receipt of this duly entered judgment, shall pay to the plaintiff, SHAWKI IBRAHIM, total damages in the amount of Five Hundred Fifty Seven Thousand Two Hundred Eighteen Dollars and

Eleven Cents ($557,218.11) as well as payment for plaintiff's legal fees and costs to be determined by this Court.

Dated: New York, New York
April , 1998

RAYMOND J. DEARIE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

SHAWKI R. IBRAHIM,

Plaintiff, 82 Civ. 0177 (RJD)

- against - **AFFIDAVIT**

NEW YORK STATE
DEPARTMENT OF HEALTH,
et al.,

Defendants.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

TERI LANDIN, being duly sworn, deposes and says:

1. I am Retirement System Actuary in the office of H. Carl McCall, Comptroller of the State of New York. I have served in that title for 11 years.

2. I have reviewed the affidavit dated March 18, 1998 of Gordon J. Hamilton, Principal Auditor of State Expenditures in the office of H. Carl McCall, Comptroller of the State of New York. Attachment A thereto calculates the amount of pre-judgment interest which would be payable to the Plaintiff, utilizing a methodology treating the whole lost wage differential as being due and owing on July 1 of each year.

Attachment B thereto calculates the amount of pre-judgment interest which would be payable to the Plaintiff, utilizing a methodology treating the whole lost wage differential as being due and owing on April 1 of each year. Attachment C thereto calculates the amount of pre-judgment interest which would be payable to the Plaintiff, utilizing a methodology treating the whole lost wage differential as being due and owing on January 1 of each year. Attachment D thereto calculates the amount of pre-judgment interest which would be payable to the Plaintiff for a sample year (1984), using an exact pay-period by pay-period analysis.

3. If the increase in salary was payable in equal installments throughout the year, and the value of these payments is determined as of the end of the year for the purpose of assessing interest, using a July 1 payment date (middle of the year) would be the appropriate approximation if an exact calculation is not feasible. The methodology utilized in Attachment A, treating the lost wage differential from the July 1 mid-point, is the correct and accepted practice.

/s/ Teri Landin
Teri Landin

Sworn to before me this
18th day of March, 1998

/s/ Harvey C. Silverstein
Notary Public

HARVEY C. SILVERSTEIN
Notary Public, State of New York
No. 4758832
Qualified in Albany County
Commission Expires January 31, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - X
:
IBRAHIM,
: CV-82-177
Plaintiff,
:
-against- United States Courthouse
: Brooklyn, New York
NYS, *ET AL.*,
:
Defendant.
: November 10, 1997
- - - - - - - - - - - - - X 10:00 o'clock a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE RAYMOND J. DEARIE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: CHARLES M. POWELL, JR., ESQ.
111 Broadway
New York, New York

For the Defendant: STATE of NEW YORK
Office of ATTORNEY GENERAL
Litigation Bureau
120 Broadway
New York, N.Y. 10271-0332
BY: CHARLES F. SANDERS, ESQ.

Court Reporter: Marsha Diamond
225 Cadman Plaza East
Brooklyn, New York
718-254-7218

MR. POWELL: Charles M. Powell, Jr., good morning Your Honor.

MR. SANDERS: Charles F. Sanders, New York State Attorney General.

THE COURT: Yes. Good morning. Are we ready to proceed?

MR. POWELL: Yes, we are, Your Honor. There is, I guess, there is only one small issue that needs to be addressed. I received on Friday at about five o'clock from Mr. Sanders a memorandum of law that speaks to the search issues -- legal issues relating to this particular trial on damages. I have not had an opportunity to respond to that and I don't know whether the court would want me to attempt verbally today or whether or not at the conclusion of the hearing that there may be a very, very short period of time because, as you know, Mr. Ibrahim, and the court and I am sure Mr. Sanders is at the point -- now says this has to be some point of closure which we are showing that today will be that day. I just feel that I would need --

THE COURT: We finally have reached a point of consensus in this case.

Let me first check. Mr. Sanders, do you join us in that regard?

MR. SANDERS: Excuse me?

THE COURT: I am being facetious.

MR. SANDERS: Yes, Your Honor, as far as consensus.

THE COURT: I don't think it is necessary, Mr. Powell, for you to respond. I was a little bit surprised by that. Well, I think I have made clear throughout that this is an opportunity granted to Mr. Ibrahim by the Court to reopen his case with respect to a single issue and I think that it is quite clear and that is, the negative implications of the award previously made to him, and that's what I am prepared to hear testimony.

MR. SANDERS: That is the reason I felt the need to address the matter as far as the memorandum of law. The only reason was that was my understanding at the time -- we were back here before you in January, that's what the situation was. However, I have to is say after receiving his second expert's report there were a number of matters which had been addressed in there which had never been brought up to the court at a previous time. For example, one of the matters --

THE COURT: I read the papers. I understand. I think I made myself clear that this morning and previously.

MR. SANDERS: Thank you.

THE COURT: That is about the negative tax implications of the award previously made and directed by the Court. We are not going to have a new trial. I think we have extended reasonable latitude to Mr. Ibrahim and, indeed, arguably gone beyond what is necessary or appropriate, but given the fact that we are talking about the

passage of time I thought it appropriate to allow him to supplement the trial record with respect to this one issue and that's why we are here. Mr. Ibrahim keeps raising his hand, I don't know whether to recognize him or you.

MR. POWELL: So that I can be clear, Your Honor, in each of the categories that our witness will testify to, it clearly relates itself to what we consider to be the negative tax impact there are about four or five categories. Is there some objection? I don't want to run afoul of Your Honor. I did read your order. I do understand that you want it to be regarding negative tax impact. That is what our expert is prepared to testify to in certain categories.

THE COURT: Of the award made I am not going to go back and revisit it. I made a reward for certain damages. It's been laid out in the papers: Back pay in the principal component of that, okay, and that's what this trial is limited to, those numbers.

Why, with all due respect to all of you, this couldn't be agreed to is beyond me, but apparently, there are differences that need to be resolve at trial.

Mr. Ibrahim.

MR. IBRAHIM: May I say, Your Honor, the report was $120,000 in 1993. Now it is 106. Is he going to take 106 or 120, that is one point. The second point is the interest is a function of the principles. When it goes up it goes up and it goes up with time. So, if we restrict the issue to the -- I mean the taxes, we will forfeit the issue of passing time interest income to me as a necessity through passing time, so it has to address that.

THE COURT: Well, of course until that check is cut the clock is still ticking.

MR. IBRAHIM: Yes.

MR. POWELL: Let me just tell you briefly a summary of what the witness will deal with. The back pay as we describe uncompensated wages interest on that, we are talking about the vacation and personal days and sick days.

THE COURT: Vacation was included; sick leave there was no proof at trial.

MR. POWELL: We are then again talking about the tax impact on each of those categories.

THE COURT: That's right.

MR. POWELL: So, is Your Honor saying we should not have any discussion at all about sick days?

THE COURT: It is not relevant.

MR. IBRAHIM: It is a fringe benefit.

THE COURT: We have had a trial, taken testimony. I am limited to the issues that were the subject of the award.

How far apart are the parties, if I may go off the record.

(Discussion held off the record.)

THE COURT: Let us proceed, shall we.

MR. SANDERS: Yes, Your Honor.

THE COURT: Mr. Kelly come forward.

H A R V E Y K E L L Y,
having been first duly sworn,
testified as follows:
(Time noted: 10:13 a.m.).

THE COURT: Any disqualifications, Mr. Sanders?

MR. SANDERS: No, Your Honor.

MR, POWELL: So stipulated. He is qualified. I don't have to ask qualifying questions.

THE COURT: Yes, sir.

MR. POWELL: Judge, I am also -- I guess we will go right to the report again. I have submitted to Mr. Sanders a copy of the report and also, to the Court which has been updated to one extent which I would like to provide the Court. So, I guess we should have this marked since we are going to want to have this submitted as Plaintiff's Exhibit 1 for identification purposes.

THE COURT: You can mark it in evidence Plaintiff's 1. That is the report itself?

MR. POWELL: This is the report. There is one additional page which I have given Mr. Sanders a copy of which I only have one extra copy of it here, and that's just an update as to certain figures inclusive as to taking it up and into and through November l0th, today, since the last report ended at June 25th.

THE COURT: All right. At the break, let's remember we will have a court make a copy of it. Go ahead.

(Plaintiff's Exhibit 1 received and marked into evidence.)

MR. POWELL: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. POWELL:

Q Good morning, Mr. Kelly.

A Good morning.

Q Mr. Kelly, since we have now qualified you and since I believe you have a copy of the report with you that has now been marked into evidence as Plaintiff's 1 --

A Yes, I do.

Q -- would you in preparation for the day indicate to the Court and Mr. Sanders what documents you have reviewed and what you utilized in preparation of the report that has been marked as Plaintiff's 1?

A Yes. I listed the various documents on page one of the report that I considered.

THE COURT: The report is on, just so the record is absolutely clear, on the Price Waterhouse stationery dated June 25, 1997?

THE WITNESS: That is correct.

THE COURT: And the documents are listed at the lower portion of that first page?

THE WITNESS: Right.

A Among other things, I considered the various tax tables of federal, state and local government and to determine which tax rates would be applicable to Mr. Ibrahim, both should he receive an award in the current year and as well what his rates would have been had he earned the income back in the prior years 1979 through 1990, I did analyze various Internal Revenue publications that would be applicable to this. I did analyze Mr. Ibrahim's tax returns 1979 through 1990, various payroll records of Mr. Ibrahim as well as a comparable individual that would have been grade 27 employee that Mr. Ibrahim was entitled to and various employment agreements between the State of New York and the civil service employees as well as various court rulings analysis that Mr. Ibrahim provided to me.

Q That was one of the court's ruling that you reviewed, the memorandum in order and of the Honorable Raymond Dearie dated January 20th, 1995?

A Yes, I looked at that ruling.

Q I am going to ask you to summarize what would be the objectives of the report with respect to the Judge's prior order and your understanding of your need to testify here today?

A I was asked to put together a summary and quantify the damages to Mr. Ibrahim as it relates to the five

components of damage: The back wages that Mr. Ibrahim was entitled to, the interest that would have accrued on those back wages, which I the description is interest uncompensated wages and quantification of the dollars of damage related to vacation and personal day. I believe it was 25 days referred to in the order that Mr. Ibrahim was entitled to, as well as six sick days and additional category of unjust enrichment to the Department of Health which relates to the fact that they had the use of those funds for a number ever years, rather than having paid it to Mr. Ibrahim; and to then calculate from that, if any, the negative tax consequences to Mr. Ibrahim of receiving the award in a lump sum currently, rather than having been paid through the years.

Q Can we start with uncompensated wages, what do you describe as uncompensated wages?

A There are a number of plaintiff exhibits: C, D and E, that summarize the detailed calculations for that $106,000 of uncompensated wages that is in the summary comparing Mr. Ibrahim's actual pay during the years 1979 through 1990. When I referred to that I am really speaking about the period February 1, 1979 through September 27, 1990 which is the period referred to in the court order comparing the salary that Mr. Ibrahim was paid to an equivalent salary that I remember referred to as lodestar salary of a grade 27 individual.

Comparing the two, there are new adjustments to put them on a comparable basis, then calculating the difference which turns out to be $106,248 of differentials in wages.

Q Did you do any sort of analysis of what we know, at least in this court proceeding, as to the negative action impact of that particular number 106,248?

A Yes, I did. What I did was calculate if Mr. Ibrahim receives that amount of funds today how much taxes he will have to pay on that currently. I also took that $106,248 and using Mr. Ibrahim's previous tax returns for all those various years added back in each given year that additional amount of income to his tax returns and in effect recalculated his tax obligation for each year, and said, okay, if he received -- I guess the easiest example, if I refer to one particular year, for example, in the year --

Q Not to cut you. Are you referring to an exhibit?

A -- Yes, I am. I am sorry. Exhibit E and on exhibit E you will see that I calculated it in the year 1979, for example, Mr. Ibrahim would have received an additional compensation of $5,640.20. The detailed calculations of the impact on his tax returns are reflected on exhibit -- I am sorry, J,, but essentially what I did was add that $5,640.20 of additional income to his taxable income for that year and quantify how much more taxes he would have paid for on it in the year 1979, and alternatively I have said how much tax will Mr. Ibrahim owe today if he receives the damages in the amount that's been calculated here. And based upon that I determined that Mr. Ibrahim will pay on the $106,248 of back wages n additional $28,238 of taxes that he would not have paid had he earned -- had he received his money all along in the years 1979 through 1990.

Q The total amount of damages that you calculate Mr. Ibrahim should received for uncompensated wages?

A Would be $134,476 that is reflected on page two of my report.

Q Mr. Kelly, can you describe to the court what you then considered to be the interest on uncompensated wages as a category in your report?

A Yes, I analyze -- I took the amount of uncompensated and timing of the -- when those occurred and calculated the amount of interest from the year in which the other payment was made through this particular report actually calculates the interest through. I think it is June 25th -- I am sorry -- through May 31st. I have a supplemental letter indicating those interest rates, but using the rate that is established, and I believe it is Revenue Rule 6621 for large corporations, applying that rate, determined that the interest that would have accrued on that essentially -- I did the math to calculate the interest accrued on the 106,248 wages would be two two eight nine zero nine two.

Q Mr. Kelly, can you just take us back through, very briefly, and as much as you can in layperson's terms, and explain us to the relationship between uncompensated wages and the interest as you have equated those numbers in your report?

How do you, in fact, arrive from one to the other as far as an overall conclusion as to the total amount for uncompensated wages and interest on uncompensated wages?

A I am sorry. Could you ask the question again?

Q Take us through your journey between, one, the number that you utilized for uncompensated wages and how you arrived at interest on that?

A Okay. That's probably best done by looking at Exhibit F of my report, and in Exhibit F of my report it lays

out the calculation precisely. There is a column in that Exhibit F described as current lost wages deferential and if one were to add the numbers the first number that is column: $5,604.20. If one were to add those numbers in that column up that would come to the $106,248 of wages. So, what I have essentially done is spread those out to each year and then calculated there is an interest multiplier column which is the second to the far right.

Q What does the interest multiplier column represent?

A It -- essentially what that is, is the interest rate applicable to each given year. The methodology that I used in terms of algebra, if you will, is consistent with that used in a couple of documents that I saw previously submitted to the court, including one, I believe, that Mr. Sanders in an affidavit incorporated right in connection with his calculations in an affidavit. That is the algebraic rate itself, the IRS corporate rate which I was advised to use.

THE COURT: That is the only rate that you used?

THE WITNESS: That's correct.

THE COURT: If that were not the right rate these numbers would have to be redone?

THE WITNESS: Yes, if that were not the right rate, that is correct.

THE COURT: This is an interest award against a sovereign. In your experience do you have any familiarity with the choice of the rates when a sovereign is involved as opposed to a public corporation?

THE WITNESS: Well I don't have any experience, *per se*. Mr. Powell advised me that that was the appropriate rate to use in the circumstance. I did briefly look at the issue from my experience, if you will, to see whether that seemed reasonable to me, and one thought that occurred to me was that this was an entity that by virtue of the amount is in question is an amount upon which taxes had to be paid So, unlike some situations where the state government, for example, does not pay taxes to the federal government this, in fact, is not money, this is not the state's money, *per se*. It is the money that is owed to an individual who will then have to pay the federal government taxes. So, it didn't strike me as unreasonable to use it but I did in a large part rely on Mr. Powell's advice.

THE COURT: Okay.

Q Thank you, Mr. Kelly.

So, the total of undue compensated interest and undue compensated wages based on the your analysis that you just indicated is how much?

A $289,092 before calculating the detrimental tax impact.

Q Now, the detrimental tax impact is the same as when the court uses negative impact, that term?

A Yes, I believe so.

Q So, what is the detrimental tax impact on the interest on uncompensated wages?

A That amount was calculated to be $271,299.

Q And how did you arrive at that conclusion that there is, indeed, a negative tax impact on the uncompensated or on the interest?

A Once again, if Mr. Ibrahim is paid $289,092 today in an award that is taxable income to him, that you will have to report not only to the state government but to the federal government as taxable as well, so I calculated based on the schedules of taxable income at which rates would be in effect, how much taxes he would owe on that amount of money, and essentially that was the two hundred seventy-one two hundred ninety-one is the tax that he will pay on that award.

THE COURT: He will pay $271,000 on taxes on the $289,000 award, what am I missing?

THE WITNESS: Let me say it differently. I probably didn't state that clearly.

A more clear way of saying it is what I calculated was how much taxes, how much would Mr. Ibrahim have to be paid in order to result in him receiving $289,092. So, if one looks at my report in the far right hand column where it's total damage, a clear way of describing it would be the five hundred sixty thousand three ninety-one, that I calculated he will owe $271,299 taxes on which will result in his receiving net two hundred eighty-nine thousand ninety-two dollars.

We have a standard program at Price Waterhouse that we use for our financial planning for our tax clients and various other matters where the question at hand is how much? If I want to receive X amount how much do I have to earn before tax and how much taxes do I pay on that.

We use that same program to calculate that. The question was now that I have calculated two hundred eighty-nine zero ninety-two is the amount due to Mr. Ibrahim, how much does he have to be paid, so that after tax he gets that amount, that is, effectively --

THE COURT: And that amount is how much?

THE WITNESS: The amount that he would have to pay: Five hundred sixty thousand three hundred ninety-one.

Q That was my next question. Can you give the Court some indication as to why the taxes on the interest on uncompensated wages would be so high?

A Yes. I can assure you I am speaking generically to it first and then I can point you to the exhibit that calculated, but in general terms the tax rate for federal taxpayer in effect is 39 percent for somebody who have this high of an income amount in that particular year, 39 percent, the additional amount of state and local tax.

THE COURT: If you are concerned that it is a great mystery to me, it is not.

MR. POWELL: Thank you, Your Honor. Okay.

THE COURT: Not that I make this kind of money, I want the record to be very clear, but I think I understand basically when one layers on the 11, plus state and local, plus the social security taxes and the other various types of taxes that are paid to it, it gets you about in the 50 percent range which is essentially what this shows?

Q That is exhibit what?

A That would be M as in mother.

Q Now, did you do any analysis on vacation and personal days?

A Yes, I did. There is an exhibit calculated that on --

Q That's Exhibit H. I am sorry, Exhibit H, I believe?

A Yes, it is.

Thank you.

Exhibit H calculates that amount. What I did to calculate the amount of damage sustained to Mr. Ibrahim from vacation pay was I relied upon the Court's order that Mr. Ibrahim was entitled to 25 days' worth of pay, and to determine a rate of upon which the payments to Mr. Ibrahim, I used his 1995 salary based on what his daily -- I calculated it from the his payroll records, determined that he earns $280.96 per day multiplied that by the 25 days to come up with a damage figure of five thousand two hundred twenty-four dollars.

Q Did you also do an assessment as to the negative tax impact?

A Yes. The other way I did the other calculations, I determined that amount to be -- it is reflected on page two of my report one thousand three hundred eighty-eight dollars.

Q Now, you did an assessment on sick days as well.

MR. POWELL: Your Honor, do you not want us to go into that also? There was a calculation for unjust enrichment that -- you don't want us to go into as well?

Q Mr. Kelly, was there anything else that you felt that you would want to bring to the Court's attention that would allow him to understand how you arrived at the figures that you have testified to on uncompensated wages which I assume is back wages?

A Yes.

Q Or wages due or owing to Mr. Ibrahim for the period in question as per the Court's order?

A That's correct.

Q And the interest on the uncompensated wages and person days, is there anything further that you would like to add?

A I don't think so. I think the exhibits provide the bulk of the detail for how the calculations were done on the support for the amounts.

(Mr. Ibrahim and Mr. Powell conferred.)

MR. POWELL: I have nothing further, Your Honor.

THE COURT: All right. Mr. Sanders, your witness

CROSS EXAMINATION

BY MR. SANDERS:

Q Good morning, Mr. Kelly.

A Good morning.

Q Concerning the vacation day that you calculated the payment amount, you indicated you used salary for 1995?

A That's right.

Q During your analysis did you analyze as far as the days in which Mr. Ibrahim indicated that he took off as to when they occurred?

A I don't have any recall looking at the precise day.

Q Did Mr. Ibrahim had given you an affidavit that he submitted to the Court to indicate as to when he took off those particular days?

A He may have, I don't recall the particulars right now.

MR. SANDERS: Well may I approach the witness, Your Honor?

THE COURT: Yes.

Q I guess we should have this marked for identification as Defendant's Exhibit A.

(Defendant's Exhibit A marked for identification.)

May I approach the witness, Your Honor?

THE COURT: Yes.

Q I show you what has been marked for identification as Exhibit A, this is an affidavit that Mr. Ibrahim has submitted to the Court entitled Plaintiff's Affidavit Support of Application for Reimbursement of Out-of-pocket Expenses and it is dated May 7th, 1993.

I ask you, Mr. Kelly, did you review or see that document prior to making your calculations concerning his vacation day?

A Yes, this does look familiar.

Q Mr. Kelly, the dates for the vacation day that Mr. Ibrahim took off, don't they start in 1979 and conclude in 1993?

A Yes, they do.

Q And none of these days are in the year of 1995?

A That is correct.

Q And basically, you have utilized dates of 1995 where his income would be at the highest as far as what he earned as employee of the State of New York?

A I will tell you what my thinking was. My thinking was --

Q Mr. Kelly, please, is that the highest?

THE COURT: If you can answer the question as it is put to you please continue.

A Is it the highest amount that Mr. Ibrahim earned?

Q Yes.

A I don't know the answer to that question.

THE COURT: Presumably during this period from which back pay is being awarded, Mr. Ibrahim was, in fact, paid at different rates and would have been paid at different rates, do you follow what I am saying?

THE WITNESS: I do.

THE COURT: So, therefore, if you assume how many days is he permitted?

MR. SANDERS: Well, what?

THE COURT: Vacation days.

MR. SANDERS: I think it is for the State maybe, approximately, 12 vacation days a year.

THE COURT: And how many days did you calculate?

THE WITNESS: Well, there are 25 days came straight out of the order, 25 days. My thinking was that if I were to go back to 1979 and include his salary, if I were to do the amount of -- the question is five hundred four, so as a matter of convenience or expeditiousness I used his 1995 salary. The alternative would be to go back to each day to 1979 and get to add interest on that.

THE COURT: And distribute the vacation days, if you will, through the period?

THE WITNESS: Correct and add interest on.

THE COURT: So a rough approximation as to what amount might be achieved, and probably you will recoil at this notion, but if somebody is trying to get a ball-park figure, a fair number, you could take the average rate of pay during this period and apply that to 258? I am curious. I am curious where we would come out, absolutely less than the number you have but probably closer to the actual, number fair to say?

THE WITNESS: With the exception that I'm not sure that would give Mr. Ibrahim the appropriate recognition of the interest factor because I didn't add any interest on to these back wages because I used his 1995 salary. It seems to me, for example, in 1979 if I went back and used his' 79 or some blended rate I will have to then tack on 11 years worth of interest or however many years.

THE COURT: It seems to me that this is a rather small item about which the parties can agree but he's your witness.

In other words, if he didn't calculate interest, okay, on the amount of vacation time for the 25 days, that would ameliorate to some extent the back -- the inflated impact, if you will, of this narrow award, this five thousand dollars.

MR. SANDERS: Right. And my next question would have followed up with what Your Honor had indicated.

Q Mr. Kelly had indicated he had taken 1995. I didn't see a reason why not to. That's a figure as far as in the middle of what he earned between 1979 and 1995.

THE COURT: He said, fine. Okay. Then we will distribute the rate throughout the working period, but then he is going to calculate interest which will probably bring up to the '95 rate. According to the report there is no interest calculated.

MR. SANDERS: There is no interest calculated.

THE COURT: I don't recall seeing it in the report but I only read it over the weekend, but we can come back to it. I am simply saying I think it is the kind of thing we can probably reach agreement on.

MR. SANDERS: Right, Your Honor.

THE COURT: Even us, even in this case.

Q Concerning the interest rate that you used to calculate the interest on Mr. Ibrahim's uncompensated wages, also the interest rate that you used for the detrimental or negative tax impact, the detrimental impact category which we have also referred to as the negative tax impact, negative income tax component, you utilize the corporate rate that is set forth?

THE COURT: No, if the negative tax you utilize the rate Mr. Ibrahim would have paid at various years as to the interest he used, the corporate rate.

MR. SANDERS: Right as the interest as far as he used as to the corporate rate, the interest on those particular amounts that you used, the corporate rate.

Q However, here you have a governmental entry which is making the payment to Mr. Ibrahim?

A It his employer, right.

Q And you also had an individual who was making the payment to the IRS and the state authorities?

A Well, yes. I mean I don't know it this is relevant to your question, but if Mr. Ibrahim received the money at the time from his employer some of that money would have been directed -- the state government, his employer, withholds money from Mr. Ibrahim and remits it to the federal government, they remit on his behalf but I don't know if that is responsive to your question.

Q But at this point Mr. Ibrahim as an individual taxpayer will make a payment directly to the government?

A Yes, he will.

Q An there is no corporation involved here in this particular situation?

A No, not to my knowledge.

Q Concerning back pay awards, Mr. Kelly, are individuals obligated by law, now, do individuals have to pay taxes on their back pay awards?

A Yes, they do.

Although I am well versed in matters of tax, I also have a vast tax department at Price Waterhouse and that was one of the questions I posed to my tax partners in connection with preparing my report was the very question: Would this be taxed; if so, which components of it would be taxed. And after researching the relevant tax ruling we conclude it would

also be taxable to Mr. Ibrahim. And I understand Mr. Ibrahim based on my discussions with him indicated that he would have intent, that was equally his understanding, that's the rules and that he intended to pay taxes on that.

Q Now, the figure that you arrived at concerning the detrimental amount on the interest, the amount of the two hundred seventy-one thousand two hundred ninety-nine dollars, discounting the update which was provided today to the Court, you are saying that amount of money would guarantee that Mr. Ibrahim would receive the total amount of two hundred eighty-nine thousand ninety-two dollars?

A What I meant to say was if he were paid that amount that is in the total damage column for -- speaking of this one component of five hundred sixty thousand three hundred ninety-one dollars -- if he were paid, that he would pay taxes of two hundred seventy-one two ninety-nine which would leave him with a net amount of two hundred eighty-nine thousand ninety-two dollars.

Q So, therefore, he wouldn't have to pay any taxes at all on that two hundred eighty-nine thousand ninety-two dollars?

THE COURT: That is his net.

THE WITNESS: That is his net, right.

THE COURT: He paid taxes on the larger amount, the larger amount is the amount that he has to be paid, so that he nets the amounts he's due adjusted for interest, etcetera. There is an amount out there someplace, there is a number out there in the infinite universe of numbers and it is the number that Mr. Ibrahim is due to walk away from you and walk away from Uncle Sam.

MR. SANDERS: I guess what I am trying to discern and part of my problem is basically you have a situation here, what I am hearing from the witness is that basically what he is indicating is Mr. Ibrahim will get the entire interest amount tax free, that basically is the situation where we will pay.

THE COURT: Why should he pay interest? This is not for the expert, he has assumed that this is a legal question, although he probably is competent to answer it as any of us, but why should a victim -- without trying to put this dramatic -- melodramatics, why should a victim of discrimination be required to pay taxes on an amount of money that represents the delay in compensating him?

MR. SANDERS: Because I thought the purpose of the negative tax impact was to pay as far as the difference that the person would have as far as this point.

THE COURT: It is in part.

MR. SANDERS: Assuming, again, it is delay, but it is also supposed to make the person whole, he will still have a tax obligation. If you are going to consider what I am hearing, you are considering it's a part of his back pay award. He would still have an obligation pursuant to the case that he would still have to pay a tax. The situation here is what would be the difference? He will have to pay a tax, assuming that he had received the money back in whatever time period, including the interest or he would have to pay the tax at that particular time. What we are supposed to do as far as the negative tax impact if there is an additional amount that he would have to pay taking into account that he was -- he would still have to pay certain taxes.

THE COURT: This is the first time I have ever encountered, it and it is perfectly rational and logical to me, but if there is some authority out there that suggests, you know, that you are right, by all means, but logically you have to admit if we are going to put him in the position he would have been in we are going to take care of not only negative tax implications of his salary he received in a lump sum, but of any other amount which, after all, the interest is really salary, it is "delayed salary."

MR. SANDERS: Basically again what it is that basically he is not going to have to pay a tax, we will pay the entire tax burden.

THE COURT: The one thing that you have not, if I am not mistaken, calculated is a return. You assume that Mr. Ibrahim would have essentially lived hand to mouth like the rest of us do and that monies he would have received earlier, a portion of it, would be in the -- you are assuming nothing is going to be invested and he will enjoy no return on his monies, correct?

THE WITNESS: I think that is -- I am not sure I took the thinking quite that far but I can see that logic. One of the things that -- one of the thoughts that came to my mind when I was analyzing the issue is not only Mr. Ibrahim's finances, was that whether Mr. Ibrahim -- what he would have done with the money and I understand that he had a fairly high credit card debt. For example, carrying a reasonably high rate of interest, he had car loans carrying, a high rate of interest, so he had debt, okay, that maybe hand to mouth is a good way of saying it. He could have avoided interest costs, if you will, had he had this extra money to have paid down something earlier. That in no way would have resulted in any kind of tax benefit to Mr. Ibrahim or to

-- because he would not have been -- he could have reduced credit card interest, for example, but that is not a deductible cost.

THE COURT: I take it his returns gave no indication of investments?

THE WITNESS: Nothing substantial. I can look at it and refresh my memory, but certainly, I don't remember anything.

THE COURT: Let me ask you this question. He will at some point in the near future, hopefully, receive this payment and presumably exceed his cash requirements, he will have an opportunity to investment it or pay down debt, as the case may be, is that in any way calculated in your or considered in your calculations?

THE WITNESS: No, I didn't consider that but I'm not sure how that puts him in any better position today than he would have been all along.

THE COURT: Well, I'm not sure either, but somehow if I had a couple of hundred thousand dollars I would try to find some way to put some of it away, but who knows.

THE WITNESS: I have not asked him what his plans were.

THE COURT: Fair enough.

Q During the period 1979 through approximately 1986 was interest ever incurred on as far as credit cards and loans, a tax deduction in the federal government?

A I don't remember the particulars of the -- I don't recall.

Q Well, with the Tax Reform Act of 1984 at this particular time didn't the government phase it out over a period of time starting with 1986 as far as what consumers would write out as far as deductions?

They phased out over a period of time of.

THE COURT: Yes.

A The answer is yes, but as far as with tax deductions, it is not so simple. You have to look at every individual's circumstances, whether they, you know, exceeds the limitation and various issues like that and I didn't explore that with Mr. Ibrahim.

Q Concerning Plaintiff's Exhibit 1, your expert report, in referring to Exhibit F of that calculation of interest --

A Yes.

Q -- You calculate the interest or the total amount for the money that Mr. Ibrahim -- the difference as far as interest when you say total lost wages and deferential currently are current lost wage deferential for each particular year, you calculated that particular amount?

A Yes.

Q And basically, you charged interest on that particular amount as if Mr. Ibrahim had received the matter on January 1 of that particular year?

A What I did was, rather than make an assumption one way or the other, I applied the same calculation methodology the algebra general. What I sort of tried to testify to earlier, the algebra is precisely the same as that used in various other documents put forth in front of the court, including I took great comfort in the fact that it was the same methodology that was employed in an affidavit by you, Mr. Sanders. I think I put the date in my report of your affidavit. Actually it is a typo. The date November 27th. I wrote of 1997. Obviously that was not correct. It is a typo of the year but I used the same methodology.

Q But basically, the way that the wage differentials assumes that Mr. Ibrahim receives his complete wage deferential at the beginning of the year?

A It calculates the full year's worth of interest on it. That's right.

Q Therefore, doesn't take into account Mr. Ibrahim would receive as far as 26 individual payments through the year and that the interest would not have been the same as far s each particular payment?

A Yeah, that is correct.

Q And therefore, that is an accrual -- as far as the total amount that you have is an accrual of 26 different payments to equal that particular amount as far as the wage deferential?

A I didn't quite understand the last question.

Q Is it a simulation of his entire year's salary?

A Yes.

THE COURT: Yes.

Q Concerning the lodestar amount involving uncompensated wages, you made comparisons to another individual for that particular title for G 27 principal health care fiscal analysis?

A That is correct. The individual that I used, his last name was Marshall, I believe his firm name is Alan.

Q Do you remember whether or not Mr. Marshall had a number of years in title of the principal fiscal analyst position in 1979?

A My recollection is and my knowledge of this is based on the representation from Mr. Ibrahim, but my recollection is that Mr. Ibrahim advised me that Mr. Marshall had been given that position on or around 1979. My recollection is it was within a year, one year or two, one direction or the other. I don't recall.

Q Would it have made a difference to your calculations if you knew that Mr. Ibrahim would not have been eligible for a pay increment during 1979 which was included in Mr. Marshall's salary because Mr. Ibrahim would not have had enough time in title as his appointment point, February 1, 1979 that his salary would not have been the same as Mr. Marshall's, would that have been a consideration to your calculations?

THE COURT: Obviously.

THE WITNESS: Yes.

A If it is anything other than the reconciling items that I put in my report, just so we have clarity, Exhibit CC of my report adjusts the salary from the base salary and you see there that one of the items that I incorporated beginning in the year 1987 was something new, that claim in the State's contract with the his employees which is if you have a position for Five years or more at the same grade you are entitled in this case to $1250 additional per year.

I considered that in terms of duration and position but if your question is Mr. Marshall by virtue of some element of his position is entitled to some increment of payment more than Mr. Ibrahim would have been, even though they are both in 27s, yes, that would impact my calculation but I am not aware of any such thing.

THE COURT: Do you have anything further, Mr. Sanders?

MR. SANDERS: Yes, Your Honor. Just a couple of general questions as to -

Q Mr. Kelly, how much did you charge for your services for producing the report and testifying here?

A I charged Mr. Ibrahim our basic standard hourly rates. My hourly rate as a partner of Price Waterhouse is $375 an hour. The bulk the work was done by an individual's, you know, detailed calculations which I have reviewed, done by individual less than that. I believe the total amount that I
billed Mr. Ibrahim was -- which did not include yet my time for today, but would include everything up until that point was $30,000.

Q Approximately how many hours did your company spend on this particular matter?

A Good question. I'll guesstimate 200.

Q Approximately how many hours did you spend on this particular matter?

A I spent 30.

Q When did Mr. Ibrahim retain you for this particular matter?

A He retained me in the spring. To be honest, I meant to look at my file before I came here and I forgot, so I don't know the exact date, but sometime in the spring of this year.

Q Spring of 1997?

A That's correct.

Q How many times did you spend on determining Mr. Ibrahim's lodestar figures?

THE COURT: What is the point of this?

A I don't understand.

THE COURT: What is the point of that.

MR. SANDERS: I'm just trying to get an idea of how much time he spent on the particular matter.

THE COURT: It is of more interest to me, quite frankly, unless you can show me that is of significance to this case and at the moment --

Q Did you submit Mr. Ibrahim a bill for the services that you or your company rendered on its behalf?

A Several.

Q And also, how much will you charge for your appearance here in court?

A Thirty thousand seventy-five dollars times -- depends on what time you let me out of here, but however many hours.

THE COURT: Shortly we are going to stop the meter. Any moment now.

MR. SANDERS: Thank you, Mr. Kelly.

THE COURT: Anything further, Mr. Powell?

MR. POWELL: No, Your Honor.

THE COURT: Thank you, Mr. Kelly.

Good luck to you and your wife.

MR. KELLY: I'd like to thank the parties and you for permitting me the unusual departure from normal court policy of reading my beeper.

THE COURT: Yes. You have got quite a dispensation.

MR. KELLY: I will put the request letter in my son's scrap book.

THE COURT: Step down. Good luck.

Yes. I will take a short recess and be right back.

(Court recessed.)

(Court resumed.).

THE COURT: Does anybody else have anything else that they would like to add to this?

MR. SANDERS: Yes, Your Honor.

I provided Mr. Powell a copy -- I have two adds which I received in the office of the controller concerning two particular issues that came before the court. One is the situation concerning the circumstances of 1979 which the lodestar salary, and I am using Mr. Marshall and Mr. Ibrahim, basically what occurred was during trying to

determine the different amount of money that Mr. Ibrahim should receive because of the other cases the controller has indicated to me and other attorneys in the office of the Attorney General that prior to making the determination about, pay back pay award they should check with them as to -- they check the records.

One of the things they notice, as far as using Mr. Marshall's salary, was that there was the agreement between the unions and the State of New York, whereby Mr. Marshall was eligible to receive a performance advance in the amount of, approximately, $1250 July 1, 1979 and the reason why he was eligible is because he had enough time in title pursuant to the agreement to receive such an advance.

With Mr. Ibrahim's appointment being February 1, 1979 Mr. Ibrahim would not have been eligible for that particular performance of advance because he would not have had 120 days within that title, and the person would only have been eligible from, I think, the point of April of 1979 going back to June, 20 days.

So, Mr. Ibrahim would not have been eligible for that particular amount which then would affect another figure in Mr. Kelly's charts of Exhibit C of 1987 concerning column E, longevity, has indicated Mr. Ibrahim has received his first longevity payment in 1987 of $1250.

Basically, what would have occurred would be Mr. Ibrahim would not have received at that particular time, 1987; he would have received it starting in 1988.

Also, pursuant to plaintiff, to make the Court aware of the exhibits concerning the calculating of the interest at what time period, I indicated in my brief to the Court that

there are cases which hold that calculation interest could occur as far as at the end of the year.

However, something which I also ask the controller's office is that when they do back pay awards, basically what they do is use a figure and a rate as of the middle of the year.

So, basically what they did i they would take the applicable interest rate, say ten percent for the whole year, they will take the entire amount that the person would have earned during that year, say $10,000, the deferential, and they would times it by five percent. So 10,000 times five percent using as far as the middle year, rather than going to the beginning of year or to the end of the year and that is the way the state as far as calculation, as far as back pay awards, as far as giving someone as far as interest.

THE COURT: Is it mistake? It is another method?

MR. SANDERS: Yes, as I said, again, informing the court as far as different.

THE COURT: You know what confounds me about this case, to be quite candid with you, as having ruled back in December 1996 with the lower interest, that the lower rate applies, he now get an expert who is retaining in the following spring who used corporate rate but this $1200 deferential that you talk about or this one year delay, the receipt of the longevity pay and relatively modest impact of these, assuming you are accurate over the overall picture are hardly worth arguing about -- Mr. Ibrahim, please do not gesture while I am speaking, it is very distracting. I think I have been very patient, at least I hope I have. These are almost nickels and dimes, as well as the additional point that

I bring up about the alternate way of calculating what point during the year do you start to calculate back pay and interest.

The only issue here that seems to be of magnitude that would prevent us from resolving these issues right here on the spot is this. If I understand you correctly, Mr. Sanders, this claim -- or during argument that we should not be compensating Mr. Ibrahim for the tax he pays on that portion of the award that represents interest, and I've never dealt squarely with this issue before. I told you what I think as a matter of common sense, but if you have any authority that would particularly educate me on this issue that is separating the parties -- not whether it is $1200 performance advance or whether or not there is a one year delay in the amount of longevity pay. That is the only issue.

MR. SANDERS: And Your Honor, what I have done at this point is I'll go back again, but I think if you go to the citations, both utilizing the cases that I have previously cited to you and that I have also included an update of all the cases that I know that discuss just this matter, period.

THE COURT: I don't have any cases from you, unless I did leave the report -- the memorandum inside. I think I left your memorandum inside. The memorandum doesn't deal with the question of whether or not we should compensate Mr. Ibrahim the tax implications of the interest portion of the award, unless I missed something.

Mr. Powell, am I crazy or is that really the sticking point here?

MR. POWELL: Well, certainly as to those categories that we covered here today, that is exactly what the ticking

point is. It is whether or not there should be a tax impact on interest on the uncompensated wages which, as I said earlier today, that is what takes us far a part, of course.

THE COURT: By the way, the other thing is probably not a very big issue either, this question of whether it is a corporate rate or the lower rate because he's at a tax rate where the difference in terms of dollars in his pocket is marginal. It's a pass through almost. So, if you have any -- did I miss something in your brief?

MR. SANDERS: Pages 11 through 13.

THE COURT: Do you mind if I borrow a copy?

MR. SANDERS: No, I don't.

THE COURT: Mine is inside on my desk. I had it out here and I just took it.

I see what you have written here. I didn't understand this to be a reference to this issue, whether or not he should be compensated for the addition of tax he pays on the interest portion of the award. Needless to say, we should not -- I'm not suggesting that the award should in any way relieve him from the tax burden, okay. Again, the goal -- he shouldn't be in any better position by virtue of this position than he would have been if had he been paid in the position. I might also point out to the extent that it should include an adjustment for the impact of the tax on the interest is to put him in the same position he would have been in, not any better position, and I consider that all part of back pay, whether you call it back pay, whether you consider it interest prejudgment interest on back pay. If there is some guidance

from the cases that suggests that the Court should moderate it's award of back pay, I'm not aware of it.

MR. SANDERS: I should indicate to Your Honor this is the first time I have ever dealt with this particular issue.

THE COURT: Your office has no doubt dealt with this many, many times and I think you are going to find when you return, when you lay out the problem that if he has to pay taxes on the interest the delay in effect is a sum of money that represents the delay in his receipt, then the department has got to pay him a sum of money that will put him in the same position he would have been in had he been paid incrementally throughout the period.

Now, if I am right and factoring in some number for these other adjustments that you are talking about, is there any reason why we can't resolve this judgment?

MR. POWELL: No.

THE COURT: Mr. Kelly's figures would have to be adjusted to reflect the reduced rate of interest that could be done in a moment, presumably, no doubt all in the computer.

THE COURT: All right. Let us leave it this way. I can't talk to myself, so is there anything else anybody else would like to offer? Mr. Ibrahim, what is it?

MR. IBRAHIM. 1997 tax return for me for my income $42,000 will be implicated with two twenty-one thousand dollars tax at fifty percent, whereas I paid fifteen percent. This was not taken into consideration of Mr. Kelly and it is a repercussion and an effect of the situation that I

was -- I am brought to, that I have to pay on all the amounts, including my income in 1997, fifty-two percent federal, state and city. The thirty-seven percent tax difference I will pay it as a penalty because I will get the lump sum in 1997.

THE COURT: So what you are saying is you were paid forty thousand dollars in 1996.

THE COURT: Are we talking about the '96 or' 97.

MR. IBRAHIM: '97 which is coming.

THE COURT: Let me see if I can say it to your satisfaction, that means I understand it, so you were paid paying fifteen percent, one five?

MR. IBRAHIM: Yes.

THE COURT: At the rate of forty thousand dollars this is federal now?

MR. IBRAHIM: Yes, yes.

THE COURT: Once you add the additional monies your tax rate will go up to the fifty percent.

MR. IBRAHIM: Fifty-two percent.

THE COURT: All right fifty-two percent?

MR. IBRAHIM: Yes.

THE COURT: So instead of paying fifteen percent of forty you will pay fifty-two percent ever forty and that deferential has not been calculated by Mr. Kelly.

MR. IBRAHIM: No, it was not because they don't have information, they just list it on one of the exhibits here.

THE COURT: Okay. I understand your point; is there anything else anybody else would like to add?

MR. SANDERS: I will discuss the matters as far as the Department of Health.

THE COURT: You have until the end of the week to supplement the file. I will issue a memorandum at the end of next week.

Anything else?

MR. POWELL: No, Your Honor.

THE COURT: Anything else, everybody.

MR. IBRAHIM: As regards to the one fifty which he said about it, I have the payroll card of Marshall. He says Marshall. He says he goes to his boss, longevity, 12 12 50 starting 1987.

THE COURT: I didn't know he was comparing you with Marshall on the longevity. He was comparing you on what I will call, for a lack of the better way, assigning bonus, but I think he called it a performance advance.

MR. IBRAHIM: Yes, it is a performance advance.

THE COURT: Did you receive yours in 1980.

MR. IBRAHIM: No, no, and Alan Marshall did not receive it in 1980. According to the record here, it is 1987.

THE COURT: We are talking about two different things.

MR. IBRAHIM: It is the performance, Your Honor.

THE COURT: When did you receive?

MR. SANDERS: He talking about two different thing and basically, I addressed both particular situations.

What I indicated to you was that concerning the 1980 situation as to the performance advance, that Mr. Ibrahim would not be qualified as far as receiving the performance advance in 1980, that would impact on Mr. Ibrahim's longevity payment. Mr. Marshall did receive his longevity payment in 1987, but Mr. Ibrahim DID not. Mr. Ibrahim not being able to receive the performance advance he would not have been able to receive the longevity in 1987. The first time it would occur would be in 1988.

THE COURT: Okay. Mr. Powell, you understand this argument?

MR. POWELL: Yes, I do, Your Honor.

THE COURT: Talk to your client. If you are of a different view you let me hear from you by the end of the week.

MR. SANDERS: I believe we provided you copies as far as the affidavits I have mentioned here, and I will file the originals as far as with the Clerk's office.

THE COURT: Now, if your office confirms what I believe is the case would you please call Mr. Powell and see

if you can work this thing out because I am going to have to work out some sort of a modification for these numbers that you have talked about and it is silly that I do it. The two of you should do it.

MR. POWELL: Anything we need to supplement can be done in a form letter?

THE COURT: Yes, but by the end of the week.

MR. POWELL: Yes.

MR. SANDERS: Yes.

MR. IBRAHIM: Thank you, your Honor.

(Proceedings adjourned as above set forth.)

1177 Avenue of the Americas
New York, New York 10036
Telephone: 212-596-7000
Facsimile: 212-596-8910

Price Waterhouse LLP [Letterhead]

June 25, 1997

Charles M. Powell, Jr., Esq.
Charles M. Powell, Jr. & Associates
111 Broadway, 6th Floor
New York, NY 10006

Re: Shawki R. Ibrahim ("Ibrahim") v. New York State Department of Health, et al. ("Department of Health")

Dear Mr. Powell:

At your request, I read the January 20, 1995 Memorandum and Order of the Honorable Raymond J. Dearie in the above referenced matter and have quantified the economic effects of the Department of Health's failure to promote Ibrahim from grade 23 analyst to grade 27 analyst. This report documents my findings and conclusions.

I am a certified public accountant and a partner in the accounting and consulting firm of Price Waterhouse LLP ("Price Waterhouse") with offices at 1177 Avenue of the Americas. My experience includes analysis of financial,

economic and accounting issues in disputes as set forth in my curriculum vitae (Exhibit A).

The findings and conclusions reported herein are based upon work performed by me and other Price Waterhouse professionals working directly under my supervision. Price Waterhouse has been compensated for the time of all professionals at their regular billing rates ranging from $140 to $375 per hour.

During the course of my work, I considered various documents including:

- Federal, New York State and New York City tax schedules and tables;
- Various Internal Revenue Service publications;
- Ibrahim's 1979-1995 income tax returns;
- Payroll records of Ibrahim, including W-2s and various Statements of Salary and Deductions for Direct Deposit;
- Lodestar's Payroll/Wage Cards;
- Employment agreements between the State of New York and the Civil Service Employees Association, Inc.;
- Relevant court rulings; and
- Various analyses prepared by Ibrahim.

Based upon my analysis, the economic effects of the Department of Health's failure to promote Ibrahim from grade 23 analyst to grade 27 analyst during the period February 1, 1979 through September 27, 1990 ("Relevant Period") include the following:

1. Undercompensated wages during the period February 1, 1979 through September 27, 1990;

2. Pre-judgment interest on undercompensated wages;

3. The value of vacation and personal days determined by the Court to be associated with this litigation;

4. Lost wages associated with sick days which Ibrahim claims are directly attributable to this litigation; and

5. Additional unjust enrichment to the Department of Health.

Moreover, I determined that due to the differing tax brackets and rates, Ibrahim will be required to pay a higher amount of income taxes on the damages awarded as a lump sum than the taxes that he would have paid had he been properly compensated throughout the Relevant Period.

The chart below summarizes the amounts of damages that I determined are associated with each of the above factors.

	Damages	Detrimental Tax Impact of Lump Sum Payment	Total Damages
Undercompensated Wages	$ 106,248	28,228	$ 134,476
Interest on Under-compensated Wages	289,092	271,299	560,391
Vacation and Personal Days	5,224	1,388	6,612
Sick Days	11,091	2,947	14,038
	$ 411,655	**303,862**	**$ 715,517**
Additional Unjust Enrichment to the Department of Health	159,758	146,758	306,516
Total	**$ 571,413**	**450,620**	**$ 1,022,033**

Undercompensated Wages

To calculate the amount of undercompensated wages that Ibrahim is owed, I compared the Lodestar salary figures for a grade 27 analyst to Ibrahim's mitigating salary for the Relevant Period (Exhibits B-E).

Lost Interest on Undercompensated Wages

I calculated the interest on the Undercompensated Wages through May 31, 1997 to be $289,092 (Exhibit F).[1/] At your request, the interest is calculated in a manner consistent with the methodology used in the Charles Sanders Affidavit issued on November 27, 1997 and calculations performed by Ibrahim.

Vacation and Personal Days

Pursuant to the January 20, 1995 Memorandum and Order, I calculated the damages to Ibrahim associated with the 25 vacation and personal days using Ibrahim's 1995 salary. The daily wage rate was determined to be $208.96. Accordingly, the damage assessed for these 25 days is $5,224 (Exhibit H).

Sick Pay

Ibrahim advised me that due to the increased stress of this litigation, he was forced to take more sick days than he otherwise would have. The number of sick days that he used in the period from 1991 through 1994 was more than the credits he had accumulated. Accordingly, when he took sick days after his sick leave accumulation was depleted, he was only paid a portion of his salary. The damage amount of $11,091 represents the difference between the amount that Ibrahim was paid for excess sick days and the amount he would have been paid had he worked on those days (Exhibit H).

[1/] The interest rates used in this calculation are based on underpayment rates specified in the Internal Revenue Code §6621 (Exhibit G).

Additional Unjust Enrichment of the Department of Health

At your request, I have calculated the amount of unjust enrichment to the Department of Health based upon the theoretical interest earned by the Department of Health on the full amount of Ibrahim's annual salary, less mitigating wages earned by Ibrahim at his other employer and excluding interest otherwise included in other reported damages calculated. Under this method, the additional unjust enrichment to the Department of Health was $159,758 (Exhibit I).

Tax Effect of Lump Sum Payment

To compensate Ibrahim for the negative tax impact of receiving these amounts in a lump sum rather than over a period of years, I first calculated the tax differential at the time Ibrahim would have received the wages by recreating Ibrahim's 1979 through 1990 hypothetical Federal, New York State and New York City tax returns (Exhibits J & K). I then calculated the taxes due on the lump sum payment which Ibrahim will have to pay in 1997. The assumptions by which I calculated the tax effect of the lump sum payment are detailed in Exhibit L. The tax gross-up calculations are detailed in Exhibit M. The Detrimental Tax Impact of a Lump Sum Payment is the difference between the taxes that Ibrahim would have paid during the Relevant Period and the taxes that Ibrahim will have to pay in 1997 due to the Lump Sum Payment (Exhibit N).

Alternative Damage Calculation

You have advised me that Mr. Ibrahim has prepared alternative damage calculations totaling up to as high as $773,915 for damages before Additional Unjust

Enrichment to the Department of Health. To the best of my understanding, the increase of $58,398 from my damage calculation arises from certain different understandings principally related to tax gross-up methodologies and statutes of limitations issues. I have, however, not reflected the additional $58,398 in my damage calculation.

Sincerely,

/s/ Harvey R. Kelly
Harvey R. Kelly

Enclosures

cc: Shawki Ibrahim

EXHIBIT A

HARVEY R. KELLY

POSITION Partner, Price Waterhouse LLP Dispute Analysis and Corporate Recovery Services

EDUCATION Pennsylvania State University, B.S. Accounting

RANGE OF EXPERIENCE Mr. Kelly's professional career includes experience as a financial consultant specializing in forensic investigations, corporate recovery, dispute analysis and auditing. He is based in our New York City office.

Dispute Analysis Consulting

Mr. Kelly has provided dispute analysis consulting services in connection with numerous legal actions as well as alternative dispute resolution proceedings involving issues of securities fraud, breach of fiduciary duty, breach of contract, business valuation, minority equity appraisals, fraudulent conveyances and auditor malpractice. He has conducted related forensic accounting, cash flow projections, enterprise valuations, solvency analyses and other financial and economic analysis. He has provided litigation consulting services with respect to a variety of industries including telecommunications, high technology, financial institutions, retail, insurance, hospitality and real estate.

Forensic Accounting and Fraud Investigations

HARVEY R. KELLY

Mr. Kelly's experience includes extensive investigative and forensic accounting analysis related to fraud. Among other matters, Mr. Kelly has investigated management financial reporting frauds, employee embezzlements, insurance frauds and management and employee kickbacks. He has performed such services in connection with both internal investigations and legal proceedings. Selected examples of Mr. Kelly's recent forensic accounting and fraud investigation engagements include:

- Court-appointed Examiner charged with investigating allegations of fraud and improper business practices in connection with Communications Network Corporation.

- Forensic investigation and reconstruction of the $500 million financial reporting fraud at Phar-Mor, Inc. on behalf of a major stockholder and creditor.

- Forensic investigation of management fraud on behalf of a Special Committee of Board of Directors of Orange and Rockland Utilities, Inc.

- Forensic investigation of unauthorized derivative trading on behalf of a Special Committee of the Board of Directors of The Common Fund, Inc.

Corporate Recovery Consulting

Mr. Kelly has led numerous corporate recovery engagements involving troubled companies both in formal (i.e., bankruptcy) and informal reorganizations. He has provided such services on behalf of both creditors and debtors. His experience includes development and review of business plans, enterprise valuations, competitive analysis, bankruptcy consulting and consultation regarding cash management and operating efficiencies. He has provided consulting in connection with bankruptcy-related litigation proceedings (e.g., fraudulent conveyances, etc.)

He has provided reorganization consulting services in a variety of industries including retail, real estate, consumer products and gaming.

In addition to client engagement responsibilities, Mr. Kelly actively participates in related professional organizations. Currently, he is a member of the American Bankruptcy Institute Unsecured Trade Creditor Committee as well as the American Bankruptcy Institute Task Force on Preferences, which is researching and evaluating existing bankruptcy preference laws. Additionally, through his involvement as a faculty member of the Federal Judicial Center, Mr. Kelly has instructed many of the nation's bankruptcy judges on bankruptcy-related valuation and accounting issues. Mr. Kelly has also given related instructional presentations to financial institutions and professional organizations.

Auditing

Mr. Kelly's auditing and accounting experience includes managing and directing financial statement audits for numerous public and private companies operating in a variety of industries including telecommunications, high technology, retail, manufacturing, real estate and product distribution. His related experience includes assisting with financial forecasts and projections, divestitures, mergers and acquisitions and internal control reviews.

PROFESSIONAL AND BUSINESS AFFILIATIONS	Certified Public Accountant Faculty Member, Federal Judicial Center, "Bankruptcy Valuation and Accounting Issues" Member, American Bankruptcy Institute Unsecured Trade Creditor Committee Member, American Bankruptcy Institute Task Force on Preferences Member, National Association of Credit Managers Bankruptcy and Insolvency Group Member, American Institute of Certified Public Accountants Member, Various State Institutes of Certified Public Accountants
SPEECHES AND	Fraudulent Financial Reporting (1996)

PUBLICATIONS

Bankruptcy Accounting and Valuation Issues (1996)
Introduction to Principles of Bankruptcy Law (1996)
White Collar Crime - Clues to Its Detection (1995)
Forensic Accounting and Fraud Auditing (1995)
Real Estate Bankruptcy Issues (1994)
Introduction to Bankruptcy (1993)
Various Internal Price Waterhouse LLP Continuing Education Courses

EXPERT TESTIMONY/ REPORTS

In re: *Communications Network Corporation* (Bankr. S.D.N.Y.)

KLM Royal Dutch Airlines v. *Alfred A. Checchi et al.* (Supreme Ct., N.Y.S.)

In re: *McCrory Corporation* (Bankr. S.D.N.Y.)

Westinghouse Credit Corp. v. *D'urso* (Arbitration)

New York Overnight Partners, L.P. et al. v. *The Ritz-Carlton Hotel Company et al.* (Federal)

EXHIBIT B

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
02/14/79	24,660	945.86	
02/28/79	24,660	945.86	
03/14/79	24,660	945.86	
03/28/79	24,660	945.86	
04/11/79	26,387	1,012.10	
04/25/79	26,387	1,012.10	
05/09/79	26,387	1,012.10	
05/23/79	26,387	1,012.10	
06/06/79	26,387	1,012.10	
06/20/79	26,387	1,012.10	
07/04/79	26,387	1,012.10	
07/18/79	27,350	1,049.04	
08/01/79	27,350	1,049.04	
08/15/79	27,350	1,049.04	
08/29/79	27,350	1,049.04	
09/12/79	27,350	1,049.04	
09/26/79	27,350	1,049.04	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
10/10/79	27,350	1,049.04	
10/24/79	27,350	1,049.04	
11/07/79	27,350	1,049.04	
11/21/79	27,350	1,049.04	
12/05/79	27,350	1,049.04	
12/19/79	27,350	1,049.04	23,456.62
01/02/80	27,350	1,049.04	
01/16/80	27,350	1,049.04	
01/30/80	27,350	1,049.04	
02/13/80	27,350	1,049.04	
02/27/80	27,350	1,049.04	
03/12/80	27,350	1,049.04	
03/26/80	27,350	1,049.04	
04/09/80	27,350	1,049.04	
04/23/80	27,350	1,049.04	
05/07/80	27,350	1,049.04	
05/21/80	27,350	1,049.04	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
06/04/80	27,350	1,049.04	
06/18/80	27,350	1,049.04	
07/02/80	27,350	1,049.04	
07/16/80	28,714	1,101.36	
07/30/80	28,714	1,101.36	
08/13/80	28,714	1,101.36	
08/27/80	28,714	1,101.36	
09/10/80	28,714	1,101.36	
09/24/80	28,714	1,101.36	
10/08/80	30,725	1,178.49	
10/22/80	30,725	1,178.49	
11/05/80	30,725	1,178.49	
11/19/80	30,725	1,178.49	
12/03/80	30,725	1,178.49	
12/17/80	30,725	1,178.49	
12/31/80	30,725	1,178.49	29,544.15
01/14/81	30,725	1,178.49	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
01/28/81	30,725	1,178.49	
02/11/81	30,725	1,178.49	
02/25/81	30,725	1,178.49	
03/11/81	30,725	1,178.49	
03/25/81	30,725	1,178.49	
04/08/81	31,489	1,207.80	
04/22/81	31,489	1,207.80	
05/06/81	31,489	1,207.80	
05/20/81	31,489	1,207.80	
06/03/81	31,489	1,207.80	
06/17/81	31,489	1,207.80	
07/01/81	31,489	1,207.80	
07/15/81	31,489	1,207.80	
07/29/81	31,489	1,207.80	
08/12/81	31,489	1,207.80	
08/26/81	31,489	1,207.80	
09/09/81	31,489	1,207.80	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
09/2[illegible]31	31,489	1,207.80	
10/07/81	34,500	1,323.29	
10/21/81	34,500	1,323.29	
11/04/81	34,500	1,323.29	
11/18/81	34,500	1,323.29	
12/02/81	34,500	1,323.29	
12/16/81	34,500	1,323.29	
12/30/81	34,500	1,323.29	32,035.37
01/13/82	34,500	1,323.29	
01/27/82	34,500	1,323.29	
02/10/82	34,500	1,323.29	
02/24/82	34,500	1,323.29	
03/10/82	34,500	1,323.29	
03/24/82	34,500	1,323.29	
04/07/82	38,336	1,470.42	
04/21/82	38,336	1,470.42	
05/05/82	38,336	1,470.42	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
05/19/82	38,336	1,470.42	
06/02/82	38,336	1,470.42	
06/16/82	38,336	1,470.42	
06/30/82	38,336	1,470.42	
07/14/82	38,336	1,470.42	
07/28/82	38,336	1,470.42	
08/11/82	38,336	1,470.42	
08/25/82	38,336	1,470.42	
09/08/82	38,336	1,470.42	
09/22/82	38,336	1,470.42	
10/06/82	38,336	1,470.42	
10/20/82	38,336	1,470.42	
11/03/82	38,336	1,470.42	
11/17/82	38,336	1,470.42	
12/01/82	38,336	1,470.42	
12/15/82	38,336	1,470.42	
12/29/82	38,336	1,470.42	37,348.14

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
01/12/83	38,336	1,470.42	
01/26/83	38,336	1,470.42	
02/09/83	38,336	1,470.42	
02/23/83	38,336	1,470.42	
03/09/83	38,336	1,470.42	
03/23/83	38,336	1,470.42	
04/06/83	38,336	1,470.42	
04/20/83	41,403	1,588.06	
05/04/83	41,403	1,588.06	
05/18/83	41,403	1,588.06	
06/01/83	41,403	1,588.06	
06/15/83	41,403	1,588.06	
06/29/83	41,403	1,588.06	
07/13/83	41,403	1,588.06	
07/27/83	41,403	1,588.06	
08/10/83	41,403	1,588.06	
08/24/83	41,403	1,588.06	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
09/07/83	41,403	1,588.06	
09/21/83	41,403	1,588.06	
10/05/83	41,403	1,588.06	
10/19/83	41,403	1,588.06	
11/02/83	41,403	1,588.06	
11/16/83	41,403	1,588.06	
11/30/83	41,403	1,588.06	
12/14/83	41,403	1,588.06	
12/28/83	44,403	1,588.06	40,466.08
01/11/84	41,403	1,588.06	
01/25/84	41,403	1,588.06	
02/08/84	41,403	1,588.06	
02/22/84	41,403	1,588.06	
03/07/84	41,403	1,588.06	
03/21/84	41,403	1,588.06	
04/04/84	41,403	1,588.06	
04/18/84	44,716	1,715.13	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
05/02/84	44,716	1,715.13	
05/16/84	44,716	1,715.13	
05/30/84	44,716	1,715.13	
06/13/84	44,716	1,715.13	
06/27/84	44,716	1,715.13	
07/11/84	44,716	1,715.13	
07/25/84	44,716	1,715.13	
08/08/84	44,716	1,715.13	
08/22/84	44,716	1,715.13	
09/05/84	44,716	1,715.13	
09/19/84	44,716	1,715.13	
10/03/84	44,716	1,715.13	
10/17/84	44,716	1,715.13	
10/31/84	44,716	1,715.13	
11/14/84	44,716	1,715.13	
11/28/84	44,716	1,715.13	
12/12/84	44,716	1,715.13	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
12/26/84	44,716	1,715.13	43,703.89
01/09/85	44,716	1,715.13	
01/23/85	44,716	1,715.13	
02/06/85	44,716	1,715.13	
02/20/85	44,716	1,715.13	
03/06/85	44,716	1,715.13	
03/20/85	44,716	1,715.13	
04/03/85	44,716	1,715.13	
04/17/85	44,716	1,715.13	
05/01/85	44,716	1,715.13	
05/15/85	44,716	1,715.13	
05/29/85	44,716	1,715.13	
06/12/85	44,716	1,715.13	
06/26/85	46,952	1,800.90	
07/10/85	46,952	1,800.90	
07/24/85	46,952	1,800.90	
08/07/85	46,952	1,800.90	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
08/21/85	46,952	1,800.90	
09/04/85	46,952	1,800.90	
09/18/85	46,952	1,800.90	
10/02/85	46,952	1,800.90	
10/16/85	46,952	1,800.90	
10/30/85	46,952	1,800.90	
11/13/85	46,952	1,800.90	
11/27/85	46,952	1,800.90	
12/11/85	46,952	1,800.90	
12/25/85	46,952	1,800.90	45,794.16
01/08/86	46,952	1,800.90	
01/22/86	46,952	1,800.90	
02/05/86	46,952	1,800.90	
02/19/86	46,952	1,800.90	
03/05/86	46,952	1,800.90	
03/19/86	46,952	1,800.90	
04/02/86	46,952	1,800.90	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
04/16/86	49,300	1,890.96	
04/30/86	49,300	1,890.96	
05/14/86	49,300	1,890.96	
05/28/86	49,300	1,890.96	
06/11/86	49,300	1,890.96	
06/25/86	49,300	1,890.96	
07/09/86	49,300	1,890.96	
07/23/86	49,300	1,890.96	
08/06/86	49,300	1,890.96	
08/20/86	49,300	1,890.96	
09/03/86	49,300	1,890.96	
09/17/86	49,300	1,890.96	
10/01/86	49,300	1,890.96	
10/15/86	49,300	1,890.96	
10/29/86	49,300	1,890.96	
11/12/86	49,300	1,890.96	
11/26/86	49,300	1,890.96	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
12/10/86	49,300	1,890.96	
12/24/86	49,300	1,890.96	48,534.54
01/07/87	49,300	1,890.96	
01/21/87	49,300	1,890.96	
02/04/87	49,300	1,890.96	
02/18/87	49,300	1,890.96	
03/04/87	49,300	1,890.96	
03/18/87	49,300	1,890.96	
04/01/87	49,300	1,890.96	
04/15/87	51,765	1,985.51	
04/29/87	51,765	1,985.51	
05/13/87	51,765	1,985.51	
05/27/87	51,765	1,985.51	
06/10/87	51,765	1,985.51	
06/24/87	51,765	1,985.51	
07/08/87	51,765	1,985.51	
07/22/87	51,765	1,985.51	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
08/05/87	51,765	1,985.51	
08/19/87	51,765	1,985.51	
09/02/87	51,765	1,985.51	
09/16/87	51,765	1,985.51	
09/30/87	51,765	1,985.51	
10/14/87	51,765	1,985.51	
10/28/87	51,765	1,985.51	
11/11/87	51,765	1,985.51	
11/25/87	51,765	1,985.51	
12/09/87	51,765	1,985.51	
12/23/87	51,765	1,985.51	50,961.41
01/06/88	51,765	1,985.51	
01/20/88	51,765	1,985.51	
02/03/88	51,765	1,985.51	
02/17/88	51,765	1,985.51	
03/02/88	51,765	1,985.51	
03/16/88	51,765	1,985.51	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
03/30/88	51,765	1,985.51	
04/13/88	51,765	1,985.51	
04/27/88	51,765	1,985.51	
05/11/88	51,765	1,985.51	
05/25/88	51,765	1,985.51	
06/08/88	51,765	1,985.51	
06/22/88	54,354	2,084.81	
07/06/88	54,354	2,084.81	
07/20/88	54,354	2,084.81	
08/03/88	54,354	2,084.81	
08/17/88	54,354	2,084.81	
08/31/88	54,354	2,084.81	
09/14/88	54,354	2,084.81	
09/28/88	54,354	2,084.81	
10/12/88	54,354	2,084.81	
10/26/88	54,354	2,084.81	
11/09/88	54,354	2,084.81	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
11/23/88	54,354	2,084.81	
12/07/88	54,354	2,084.81	
12/21/88	54,354	2,084.81	53,013.46
01/04/89	54,354	2,084.81	
01/18/89	54,354	2,084.81	
02/01/89	54,354	2,084.81	
02/15/89	54,354	2,084.81	
03/01/89	54,354	2,084.81	
03/15/89	54,354	2,084.81	
03/29/89	54,354	2,084.81	
04/12/89	57,072	2,189.06	
04/26/89	57,072	2,189.06	
05/10/89	57,072	2,189.06	
05/24/89	57,072	2,189.06	
06/07/89	57,072	2,189.06	
06/21/89	57,072	2,189.06	
07/05/89	57,072	2,189.06	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
07/19/89	57,072	2,189.06	
08/02/89	57,072	2,189.06	
08/16/89	57,072	2,189.06	
08/30/89	57,072	2,189.06	
09/13/89	57,072	2,189.06	
09/27/89	57,072	2,189.06	
10/11/89	57,072	2,189.06	
10/25/89	57,072	2,189.06	
11/08/89	57,072	2,189.06	
11/22/89	57,072	2,189.06	
12/06/89	57,072	2,189.06	
12/20/89	57,072	2,189.06	56,185.81
01/03/90	57,072	2,189.06	
01/17/90	57,072	2,189.06	
01/31/90	57,072	2,189.06	
02/14/90	57,072	2,189.06	
02/28/90	57,072	2,189.06	

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Period (a)	Annual Salary	Salary per Pay Period (b)	Actual Base Salary
03/14/90	57,072	2,189.06	
03/28/90	57,072	2,189.06	
04/11/90	60,211	2,309.46	
04/25/90	60,211	2,309.46	
05/09/90	60,211	2,309.46	
05/23/90	60,211	2,309.46	
06/06/90	60,211	2,309.46	
06/20/90	60,211	2,309.46	
07/04/90	60,211	2,309.46	
07/18/90	60,211	2,309.46	
08/01/90	60,211	2,309.46	
08/15/90	60,211	2,309.46	
08/29/90	60,211	2,309.46	
09/12/90	60,211	2,309.46	
09/26/90	60,211	2,309.46	
09/27/90(c)	60,211	164.96	45,511.36

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Base Salary Per Salary Cards

Notes: (a) For the two week period ending, unless otherwise indicated.

(b) Salary per pay period is calculated as [(Annual Salary/365 days) * 14 days].

(c) For the one day period September 27, 1990.

EXHIBIT C

Ibrahim v. NYS Dept. of Health, *et al.*
Lodestar Salary Analysis

Year	Base Salary(c)	Holiday Pay (d)	Longevity (e)	Total Salary
1979(a)	23,456.62	314.71	0.00	23,771.33
1980	29,544.15	353.55	0.00	29,897.70
1981	32,035.37	396.99	0.00	32,432.36
1982	37,348.14	441.13	0.00	37,789.27
1983	40,466.08	476.42	0.00	40,942.50
1984	43,703.89	514.54	0.00	44,218.43
1985	45,794.16	540.27	0.00	46,334.43
1986	48,534.54	567.29	0.00	49,101.83
1987	50,961.41	595.65	1,250.00	52,807.06
1988	53,013.46	625.44	1,250.00	54,888.90
1989	56,185.81	656.72	1,250.00	58,092.53
1990(b)	45,511.36	692.84	1,250.00	47,454.20
	506,554.99	6,175.55	5,000.00	517,730.54

Notes:
(a) Period starting February 1, 1979.
(b) Period ending September 27, 1990.
(c) As per Lodestar salary cards.
(d) Represents pay associated with 3 working holidays per year calculated as 3/10th of the bi-

weekly salary [(Annual Salary/365 days) * 14 days] based on the salary from the last pay period of the year. The standards are set out in the Holiday Pay section of the *Agreement between the State of New York and the Civil Service Employees Association, Inc.: Professional, Scientific and Technical Services Unit*.

(e) If an employee maintains a position for over 5 years, $1,250 is paid to that employee annually in the first week of April. These payments are based on the Lodestar salary cards. The standards are set out in the Performance Award section of the *Agreement made by and between the Executive Branch of the State of New York and the Public Employees Federation, AFL-CIO: Professional Scientific and Technical Services Unit*.

EXHIBIT D

Ibrahim v. NYS Dept. of Health, et al.
Ibrahim Salary Analysis

Year	Total Ibrahim Salary (c)	Regional Pay (d)	Comparable Ibrahim Salary
1979(a)	18,350.14	183.01	18,167.13
1980	25,566.66	200.00	25,366.66
1981	26,256.90	200.00	26,056.90
1982	29,279.57	200.00	29,079.57
1983	32,946.57	200.00	32,746.57
1984	35,682.32	200.00	35,482.32
1985	37,447.80	200.00	37,247.80
1986	39,815.86	350.00	39,465.86
1987	41,908.72	550.00	41,358.72
1988	44,950.03	675.00	44,275.03
1989	46,914.58	700.00	46,214.58
1990(b)	36,539.11	517.81	36,021.30
Total	415,658.26	4,175.82	411,482.44

Notes: (a) Period starting February 1, 1979.
(b) Period ending September 27, 1990.
(c) As per Ibrahim's W-2 forms.

(d) Ibrahim's salary included a premium paid to employees living in the New York City region to adjust for cost of living differences. The standards are set out in the *Agreement made by and between the Executive Branch of the State of New York and the Public Employees Federation, AFL-CIO: Professional Scientific and Technical Services Unit.*

EXHIBIT E

Ibrahim v. NYS Dept. of Health, *et al.*
Comparison of Ibrahim and Lodestar Salaries

Year	Total Lodestar Salary	Comparable Ibrahim Salary (c)	Difference
1979(a)	23,771.33	18,167.13	5,604.20
1980	29,897.70	25,366.66	4,531.04
1981	32,432.36	26,056.90	6,375.46
1982	37,789.27	29,079.57	8,709.70
1983	40,942.50	32,746.57	8,195.93
1984	44,218.43	35,482.32	8,736.11
1985	46,334.43	37,247.80	9,086.63
1986	49,101.83	39,465.86	9,635.97
1987	52,807.06	41,358.72	11,448.34
1988	54,888.90	44,275.03	10,613.87
1989	58,092.53	46,214.58	11,877.95
1990(b)	47,454.20	36,021.30	11,432.90
Total	517,730.54	411,482.44	106,248.10

Notes: (a) Period starting February 1, 1979.
(b) Period ending September 27, 1990.

EXHIBIT F

Ibrahim v. NYS Dept. of Health, et al.
Interest Calculation

Year	Balance Carried Forward	Current Lost Wage Differential	Total Lost Wage Differential & Interest	Interest Multiplier	Year End Balance
1979(a)		5,604.20	5,604.20	1.0550	5,912.43
1980	5,912.43	4,531.04	10,443.47	1.1150	11,644.47
1981	11,644.47	6,375.46	18,019.93	1.1200	20,182.32
1982	20,182.32	8,709.70	28,892.02	1.1933	34,477.81
1983	34,477.81	8,195.93	42,673.74	1.1350	48,434.70
1984	48,434.70	8,736.11	57,170.81	1.1100	63,459.60

Year	Balance Carried Forward	Current Lost Wage Differential	Total Lost Wage Differential & Interest	Interest Multiplier	Year End Balance
1985	63,459.60	9,086.63	72,546.23	1.1200	81,251.77
1986	81,251.77	9,635.97	90,887.74	1.0950	99,522.08
1987	99,522.08	11,448.34	110,970.42	1.0925	121,235.18
1988	121,235.18	10,613.87	131,849.05	1.1050	145,693.20
1989	145,693.20	11,877.95	157,571.15	1.1150	175,691.84
1990	175,691.84	11,432.90	187,124.74	1.1100	207,708.46
1991	207,708.46		207,708.46	1.1225	233,152.75
1992	233,152.75		233,152.75	1.1000	256,468.02
1993	256,468.02		256,468.02	1.0900	279,550.14
1994	279,550.14		279,550.14	1.0975	306,806.28
1995	306,806.28		306,806.28	1.1125	341,321.99

Year	Balance Carried Forward	Current Lost Wage Differential	Total Lost Wage Differential & Interest	Interest Multiplier	Year End Balance
1996	341,321.99		341,321.99	1.1075	378,014.10
1997	378,014.10		378,014.10	1.0458	395,339.75
		Less: Undercompensated Wages			(106,248.10)
					289,091.65

Notes:
(a) Period starting February 1, 1979.
(b) Wages for period ending September 27, 1990
(c) Period ending May 31, 1997

EXHIBIT G

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
2/79	6%	0.50%	
3/79	6%	0.50%	
4/79	6%	0.50%	
5/79	6%	0.50%	
6/79	6%	0.50%	
7/79	6%	0.50%	
8/79	6%	0.50%	
9/79	6%	0.50%	
10/79	6%	0.50%	
11/79	6%	0.50%	
12/79	6%	0.50%	5.50%
1/80	6%	0.50%	
2/80	12%	1.00%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
3/80	12%	1.00%	
4/80	12%	1.00%	
5/80	12%	1.00%	
6/80	12%	1.00%	
7/80	12%	1.00%	
8/80	12%	1.00%	
9/80	12%	1.00%	
10/80	12%	1.00%	
11/80	12%	1.00%	
12/80	12%	1.00%	11.50%
1/81	12%	1.00%	
2/81	12%	1.00%	
3/81	12%	1.00%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
4/81	12%	1.00%	
5/81	12%	1.00%	
6/81	12%	1.00%	
7/81	12%	1.00%	
8/81	12%	1.00%	
9/81	12%	1.00%	
10/81	12%	1.00%	
11/81	12%	1.00%	
12/81	12%	1.00%	12.00%
1/82	12%	1.00%	
2/82	20%	1.67%	
3/82	20%	1.67%	
4/82	20%	1.67%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
5/82	20%	1.67%	
6/82	20%	1.67%	
7/82	20%	1.67%	
8/82	20%	1.67%	
9/82	20%	1.67%	
10/82	20%	1.67%	
11/82	20%	1.67%	
12/82	20%	1.67%	19.33%
1/83	16%	1.33%	
2/83	16%	1.33%	
3/83	16%	1.33%	
4/83	16%	1.33%	
5/83	16%	1.33%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
6/83	16%	1.33%	
7/83	11%	0.92%	
8/83	11%	0.92%	
9/83	11%	0.92%	
10/83	11%	0.92%	
11/83	11%	0.92%	
12/83	11%	0.92%	13.50%
1/84	11%	0.92%	
2/84	11%	0.92%	
3/84	11%	0.92%	
4/84	11%	0.92%	
5/84	11%	0.92%	
6/84	11%	0.92%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
7/84	11%	0.92%	
8/84	11%	0.92%	
9/84	11%	0.92%	
10/84	11%	0.92%	
11/84	11%	0.92%	
12/84	11%	0.92%	11.00%
1/85	13%	1.08%	
2/85	13%	1.08%	
3/85	13%	1.08%	
4/85	13%	1.08%	
5/85	13%	1.08%	
6/85	13%	1.08%	
7/85	11%	0.92%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
8/85	11%	0.92%	
9/85	11%	0.92%	
10/85	11%	0.92%	
11/85	11%	0.92%	
12/85	11%	0.92%	12.00%
1/86	10%	0.83%	
2/86	10%	0.83%	
3/86	10%	0.83%	
4/86	10%	0.83%	
5/86	10%	0.83%	
6/86	10%	0.83%	
7/86	9%	0.75%	
8/86	9%	0.75%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
9/86	9%	0.75%	
10/86	9%	0.75%	
11/86	9%	0.75%	
12/86	9%	0.75%	9.50%
1/87	9%	0.75%	
2/87	9%	0.75%	
3/87	9%	0.75%	
4/87	9%	0.75%	
5/87	9%	0.75%	
6/87	9%	0.75%	
7/87	9%	0.75%	
8/87	9%	0.75%	
9/87	9%	0.75%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
10/87	10%	0.83%	
11/87	10%	0.83%	
12/87	10%	0.83%	9.25%
1/88	11%	0.92%	
2/88	11%	0.92%	
3/88	11%	0.92%	
4/88	10%	0.83%	
5/88	10%	0.83%	
6/88	10%	0.83%	
7/88	10%	0.83%	
8/88	10%	0.83%	
9/88	10%	0.83%	
10/88	11%	0.92%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
11/88	11%	0.92%	
12/88	11%	0.92%	10.50%
1/89	11%	0.92%	
2/89	11%	0.92%	
3/89	11%	0.92%	
4/89	12%	1.00%	
5/89	12%	1.00%	
6/89	12%	1.00%	
7/89	12%	1.00%	
8/89	12%	1.00%	
9/89	12%	1.00%	
10/89	11%	0.92%	
11/89	11%	0.92%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
12/89	11%	0.92%	11.50%
1/90	11%	0.92%	
2/90	11%	0.92%	
3/90	11%	0.92%	
4/90	11%	0.92%	
5/90	11%	0.92%	
6/90	11%	0.92%	
7/90	11%	0.92%	
8/90	11%	0.92%	
9/90	11%	0.92%	
10/90	11%	0.92%	
11/90	11%	0.92%	
12/90	11%	0.92%	11.00%

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
1/91	13%	1.08%	
2/91	13%	1.08%	
3/91	13%	1.08%	
4/91	12%	1.00%	
5/91	12%	1.00%	
6/91	12%	1.00%	
7/91	12%	1.00%	
8/91	12%	1.00%	
9/91	12%	1.00%	
10/91	12%	1.00%	
11/91	12%	1.00%	
12/91	12%	1.00%	12.25%
1/92	11%	0.92%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
2/92	11%	0.92%	
3/92	11%	0.92%	
4/92	10%	0.83%	
5/92	10%	0.83%	
6/92	10%	0.83%	
7/92	10%	0.83%	
8/92	10%	0.83%	
9/92	10%	0.83%	
10/92	9%	0.75%	
11/92	9%	0.75%	
12/92	9%	0.75%	10-00%
1/93	9%	0.75%	
2/93	9%	0.75%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
3/93	9%	0.75%	
4/93	9%	0.75%	
5/93	9%	0.75%	
6/93	9%	0.75%	
7/93	9%	0.75%	
8/93	9%	0.75%	
9/93	9%	0.75%	
10/93	9%	0.75%	
11/93	9%	0.75%	
12/93	9%	0.75%	9.00%
1/94	9%	0.75%	
2/94	9%	0.75%	
3/94	9%	0.75%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
4/94	9%	0.75%	
5/94	9%	0.75%	
6/94	9%	0.75%	
7/94	10%	0.83%	
8/94	10%	0.83%	
9/94	10%	0.83%	
10/94	11%	0.92%	
11/94	11%	0.92%	
12/94	11%	0.92%	9.75%
1/95	11%	0.92%	
2/95	11%	0.92%	
3/95	11%	0.92%	
4/95	12%	1.00%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
5/95	12%	1.00%	
6/95	12%	1.00%	
7/95	11%	0.92%	
8/95	11%	0.92%	
9/95	11%	0.92%	
10/95	11%	0.92%	
11/95	11%	0.92%	
12/95	11%	0.92%	11.25%
1/96	11%	0.92%	
2/96	11%	0.92%	
3/96	11%	0.92%	
4/96	10%	0.83%	
5/96	10%	0.83%	

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Detail

	corporate		
month	annual	monthly	average
6/96	10%	0.83%	
7/96	11%	0.92%	
8/96	11%	0.92%	
9/96	11%	0.92%	
10/96	11%	0.92%	
11/96	11%	0.92%	
12/96	11%	0.92%	10.75%
1/97	11%	0.92%	
2/97	11%	0.92%	
3/97	11%	0.92%	
4/97	11%	0.92%	
5/97	11%	0.92%	4.58%

Notes: For the period through December 31, 1990, the underpayment rate under Section 6621(a)(2) of the

Ibrahim v. NYS Dept. of Health, et al.
IRS Underpayment Rates

Internal Revenue Code is the sum of the federal short-term rate plus 3 percentage points.

For the period after December 31, 1990, Section 6621 (c) provides that for the purposes of interest payable under section 6601 on any large corporate underpayment, the underpayment rate under section 6621(a) (2) is the sum of the federal short-term rate plus 5 percentage points.

The actual rates are detailed out in the Internal Revenue Bulletin.

EXHIBIT H

OMITTED

EXHIBIT I

OMITTED

EXHIBIT J

OMITTED

EXHIBIT K

OMITTED

EXHIBIT L

Ibrahim v. NYS Dept. of Health, et al.
Vacation & Sick Pay Analysis

Ibrahim v. NYS Dept. of Health, et al.
Tax Assumptions

The following information was provided to me by Shawki Ibrahim regarding his projected income tax returns for 1997:

- Joint tax return with two exemptions
- Wages of 8,000 (deferred compensation payments)
- Interest income of $700
- Dividend income of $250
- A state tax refund of $470
- Business Income (self-employment) of $390
- Long-term capital gains of $90
- Pension and IRA income of $22,778
- Total social security income of $10,000
- Charitable contributions of $4,000
- Medical expenses of $3,000
- Miscellaneous itemized deductions of $28,000 ($20,000 of Price Waterhouse fees, $3,000 of legal and $5,000 of other)
- All state income tax obligation will be paid prior to year-end and taken as an itemized deduction

Ibrahim v. NYS Dept. of Health, et al.
Vacation & Sick Pay Analysis

Since the 1997 income tax rates may not have been finalized as the date of this report, the tax gross-up figures were calculated based on the most recent information available.

EXHIBIT M

Ibrahim v. NYS Dept. of Health, et al.
Tax Gross-up Calculation

Undercompensation Issues

			369,118
Social Security Calculation			
Limitation $65,700		57,700	
Salary $8,000			
FICA Rate	0.062		
Gross-Up FICA	0.938		
FICA Gross-up		61,514	
FICA Gross-up	61,514		
Limitation $65,700	57,700		
FICA AMOUNT	3,814		3,814
Subtotal			372,932
Federal Tax Bracket		0.3960	
Medicare		0.0145	
Total Gross		0.4105	

Ibrahim v. NYS Dept. of Health, et al.
Tax Gross-up Calculation

Gross-Up	0.58950		632,624
New York State & City	0.11585		
Gross-Up for NYS & NYC	0.88415		
Gross-Up/Court Award			715,517
Federal Withholding		(249,317)	
FICA		(3,814)	
Medicare		(10,375)	
NYS		(50,981)	
NYC		(31,912)	
Total Tax Effect			(346,399)

Ibrahim v. NYS Dept. of Health, et al.
Tax Gross-up Calculation

Additional Unjust Enrichment to the Department of Health

			528,876
Social Security Calculation			
Limitation $65,700		57,700	
Salary $8,000			
FICA Rate	0.062		
Gross-Up FICA	0.938		
FICA Gross-up		61,514	
FICA Gross-up	61,514		
Limitation $65,700	57,700		
FICA AMOUNT	3,814		3,814
Subtotal			532,690
Federal Tax Bracket		0.3960	
Medicare		0.0145	
Total Gross		0.4105	
Gross-Up	0.58950		903,631

Ibrahim v. NYS Dept. of Health, et al.
Tax Gross-up Calculation

New York State & City	0.11585		
Gross-Up for NYS & NYC	0.88415		
Gross-Up / Court Award			1,022,034
Federal Withholding		(356,121)	
FICA		(3,814)	
Medicare		(14,819)	
NYS		(72,820)	
NYC		(45,583)	
Total Tax Effect			(493,157)
Less: Lump Sum Taxes Due on Undercompensation Issues			346,399
			(146,758)

EXHIBIT N

Ibrahim v. NYS Dept. Of Health, et al.
Allocation of Taxes

	Hypothetical Gross Wages	Hypothetical 1979-90 Taxes	Hypothetical Net Wages	Taxes Due on Lump Sum Payment (a)	Detrimental Tax Impact of Lump Sum Payment	Total Damages
Undercompensated Wages	$106,248	36,875	69,373	65,103	28,228	$134,476
Interest on Undercompensated Wages	289,092	0	289,092	271,299	271,299	560,391
Vacation & Personal Days	5,224	1,813 (b)	3,411	3,201	1,388	6,612

Ibrahim v. NYS Dept. Of Health, et al.
Allocation of Taxes

	Hypothetical Gross Wages	Hypothetical 1979-90 Taxes	Hypothetical Net Wages	Taxes Due on Lump Sum Payment (a)	Detrimental Tax Impact of Lump Sum Payment	Total Damages
Sick Days	11,091	3,849 (b)	7,242	6,796	2,947	14,038
Total	**$411,655**	**42,537**	**369,118**	**346,399**	**303,862**	**$715,517**

Notes: -

(a) Calculated by pro-rating the Total Taxes Due on Lump Sum Payment as stated in Exhibit M.

(b) Calculated by applying the effective tax rate which is calculated by dividing the Hypothetical 1979-90 Taxes on Undercompensated Wages by the Hypothetical Gross Wages [36,875 / 106.248] = 34.71%

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM, Plaintiff,	:	CV-82-177 CV-92-496
- against -	:	
NYS DEPARTMENT OF HEALTH, and NYS DEPARTMENT OF SOCIAL SERVICES,	:	United States Courthouse Brooklyn, New York
Defendants.	:	February 14, 1997 9:45 a.m.

TRANSCRIPT OF STATUS CONFERENCE BEFORE THE HONORABLE RAYMOND DEARIE UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: CHARLES POWELL, ESQ.

For the Defendants: CHARLES F. SANDERS, ESQ.
Assistant Attorney General
For: NYS Dept. of Health
and
RICHARD MATHIEU, ESQ.
Assistant Attorney General
For: NYS Dept. of Social Services

Court Reporter: FREDERICK R. GUERINO C.S.R.
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced by computer.

THE COURT CLERK: Ibrahim -vs- New York State Department of Health and Department of Social Services, Docket Nos. 82-CV-177 and 92-CV-496.

Counsel, come forward and state your appearances for the record.

THE COURT CLERK: Whose here for Mr. Ibrahim?

MR. POWELL: Charles M. Powell, Powell, Jr. Good morning, Your Honor.

THE COURT CLERK: Whose here for the Department of Health?

MR. SANDERS: I am. Good morning, Your Honor. Charles F. Sanders, Assistant Attorney General, New York State Office of the Attorney General.

THE COURT CLERK: And for the Department of Social Services?

MR. MATHIEU: Richard Mathieu, same address as Mr. Sanders.

THE COURT: Good morning, gentlemen.

I thought it at best, as you know, to get together briefly before. There appears to be one lingering issue in this long pending litigation. I'm referring to the '82 matter which has confounded me to some extent for reasons I stated in a short order inviting you in today and, that is, the question of the proof available to the court at trial, the question of the negative tax implications.

To me on the face of it this ought to be easily resolved as a matter of proof in the record or lack thereof.

MR. SANDERS: Your Honor, what I did subsequent to that, the reason why I brought up the issue concerning discovery, is, after the plaintiff amended his judgment, he came up with figures and amounts which I had not seen, and that's the reason why I brought up the question of discovery.

Subsequent to that, prior, when this conference was initially scheduled for December 19, 1996, I submitted to the court an amended judgment which included information from the trial in April of 1993, which stated as far as the amount that plaintiff brought forth into evidence by his expert as to the amount of the negative income tax, that was approximately $28,000 plus, and then what I did was pursuant to using the Internal Revenue Code, Section 6621 calculating the interest, I indicated to the court what the New York State Department of Health would deem as far as the interest amount, which should be added to, in addition to that amount. We set that forth in the mini-judgment to the court, and I also set forth as far as my reasons in an affidavit.

THE COURT: I have it before me.

What I need to know, Mr. Powell, is whether there's any difficulty with this. This judgment ought to be finalized and signed.

MR. POWELL: Judge, we believe that our amended proposed judgment reflected the revisions that have occurred in the Code. Subsequent to the actual hearing and the information that was submitted, Mr. Ibrahim's position and my position is in --

THE COURT: What changes in the Code?

MR. POWELL: The fact that the new amendments that came into effect, and the way we are looking at how the Department of Health should be viewed, that Mr. Sanders is viewing them as on an individual basis, and we are using our figures, using the Department of Health as similar to a large corporation. We use those calculations, we feel --

THE COURT: No, no, rightly or wrongly, I decided that particular issue in my order -- my memorandum and order.

MR. IBRAHIM: January 20, 1995.

THE COURT: Why am I not surprised at Mr. Ibrahim saying that.

The one issue that remains is the question of -- it is really a question of proof, that is, in the trial record on the trial on damages, what evidence is there to support your numbers? I don't see it. We had a trial.

MR. POWELL: I understand, Your Honor. I was not, of course, there, but in reviewing it, and Mr. Ibrahim's

position is that while he understands the expert reports and things of that sort, he feels should not be binding with respect to this court having the equitable powers to take into consideration what we have submitted.

We have submitted documentation to support with respect to the different Internal Revenue Code rules that allow our numbers to be utilized in our calculation, to be utilized, and we supported that substantially in our amended, you know, judgment, and that we feel that the court can now, based on the cases, that we utilize its even at the present day, not necessarily bind him to whatever the calculations were when that trial on damages occurred, but look at matters all the way up to and including prior to the entry of judgment. We have provided those calculations and the supporting documentation in detail. We acknowledge that if you are to look at just what occurred at the trial, that you probably would then deal with Mr. Sanders proposed judgment.

THE COURT: No probably about it. He's incorporated the testimony of the plaintiff's expert on that very issue.

MR. POWELL: We just feel that Your Honor should not be bound by that. That occurred quite a long time ago, as you know. So we are saying that you can look at, under the powers as a court sitting in equity up to the point of judgment, can take into consideration what you view to be what would place him in the position that he should be in based on what the Second Circuit had decided.

If you take Mr. Sanders' viewpoint, you clearly would be subjecting him to considerations that would not allow him to avail himself, as we said, of the regulations and

the revisions and the things that would allow him. What he's going to have is a very, very strong tax impact that if we use what I.R.S. has provided of late, and we submitted all of that information total court that impact would not be as great.

MR. SANDERS: Your Honor, I could not reasonably see how he could have a negative impact. That exceeds the amount of money he received, amount of damages.

THE COURT: Would you say that again?

MR. SANDERS: Basically, the amount of damages he would receive, if we go by his figures, damages would be approximately say somewhere in the range of 250- to $300,000. He's indicated he will have a negative impact that exceeds that amount, without necessarily bringing forth to the court as far as whether his prior income tax and other figures, which the expert went through, which we are not necessarily privy to as far as to make any type of calculations, and I do not reasonably see, as far as on the law or the facts, how Mr. Ibrahim can come to -- comes to court, whether equity or not, and brings forth as far as this argument --

THE COURT: Let's stay with the legal question. I will recognize you in a moment, Mr. Ibrahim. Let's stay with the legal question. It is, as I said before, a question of proof.

Now, obviously there are some aspects to a judgment that have to be updated, to use your word, as of the day the judgment is entered, and the obvious example there being the running of interest.

MR. POWELL: Yes.

THE COURT: Nobody questions that.

MR. IBRAHIM: And that's wrong, Your Honor.

THE COURT: I beg your pardon?

MR. IBRAHIM: Also the taxes were changed because at the time the expert gives his testimony, the amendment did not go through. The amendment went through after April 12, 1993, when the trial starts.

THE COURT: What amendment?

MR. IBRAHIM: The amendment of the I.R.S. law which gives the layers and the percentage and the impact. They are different from what the expert gave testimony on.

THE COURT: So, let's assume that's true. Let's assume that during the interval, during the conclusion of the trial on damages and the entry, finalization and entry of judgment, there's a change in the law. That would affect the numbers?

MR. POWELL: Yes.

THE COURT: Assume for the moment that that is true.

MR. IBRAHIM: Yes?

THE COURT: Your position is that I then am at liberty, if you will, to formulate the facts that would have

ordinarily been presented at a trial on damages and to adjust the judgment accordingly?

MR. POWELL: To take those facts, the uncontroverted facts --

THE COURT: What is uncontroverted? That's not a word I use in this case.

MR. POWELL: Well, I know everything was highly contested, but I think that everybody agrees, and Mr. Sanders even agrees, that we can use that trial on damages, and if nothing had occurred in the Internal Revenue Code, no changes as we seed - and I am not saying that he's conceded on that point - but assuming we can accept the fact there have been changes, and the information is available to the court as we present it, it seems as if there's no contesting that, Your Honor would use that information from that trial, the expert testimony, and apply it, and we are saying that you can now apply those facts to these particular revisions and arrive at the figures that Mr. Ibrahim has submitted in his judgment.

So we are not looking to change the fact or retool the facts.

THE COURT: Let's stay with my question.

MR. SANDERS: Your Honor, I would also say here's a situation that Mr. Ibrahim, as he has alleged to you, that there was a change after April 12th, between the time we were at trial, between the point in time you made your determination on January 20, 1995, that at no point in time did Mr. Ibrahim or counsel or anyone come to me requesting as far as supplement, as far as the record, to show that there

was a change in the law, to advise the court that there was a change in order, to bring forth as far as to the court --

THE COURT: Isn't the appropriate vehicle a motion to reopen the trial?

MR. POWELL: Well, as Your Honor knows we can, in fact, make a comprehensive motion to reopen the trial on damages. It included some of the issues that we are addressing, that would allow for additional evidence to come in on the question of damages, and Your Honor denied that motion.

MR. SANDERS: But nothing concerning negative income tax, nothing.

THE COURT: But are you aware of these changes?

MR. SANDERS: No.

MR. IBRAHIM: It is the law, Your Honor, it is the law. How does he --

THE COURT: Let me conduct the proceeding, okay, Mr. Ibrahim. Okay, Mr. Ibrahim? I'm trying to resolve this.

MR. SANDERS: I was not aware of the law. I'm not necessarily a person who keeps up, I will admit. I'm not a person that keeps up on the tax laws. The only time I saw this particular matter --

MR. POWELL: We would be happy to brief Mr. Sanders, who I respect as a colleague. Our office is right across the street. We can sit down and go through each

and every one of the regulations and offer him our opinions and viewpoints as to how we arrive at these conclusions, and see whether we may be able to persuade him, if Your Honor would like for us to do that.

THE COURT: Well, I'm stunned that it hasn't been attempted. He is not an unreasonable man.

MR. POWELL: I know that. The only reason it probably hasn't been, and I know Mr. Sanders, and he would probably agree to that, we have difficulty sometimes reaching each other, trial schedules and otherwise.

THE COURT: Could you tell me specifically what amendment you are referring to? This matter is not addressed. I'm somewhat at sea here because the subject was not addressed in the motion for -- essentially what was a motion for a new trial. If I'm mistaken in that, by all means, Mr. Powell or Mr. Sanders, correct me.

MR. SANDERS: No, that's what I just indicated to you, both as far as during the interim, and as far as Mr. Powell mentions, he made a motion. This particular matter was not addressed in the motion for a new trial.

MR. POWELL: I didn't mean to suggest that it was addressed directly, the hope it would be reopened, and we would then be able to address things more completely, as opposed to relying upon the proposed judgment that Mr. Field had submitted on behalf of Mr. Ibrahim, that's all I was suggesting.

THE COURT: Then in December of last year, in my brief memorandum I told you exactly what was bothering me,, the difference between the proof at trial and on the

question of negative tax implications, and the amount incorporated into a proposed judgment. I mean, if it was simply a question of law in the intervening period has changed and the calculations need to be revised, say it. Maybe there will be an agreement.

MR. SANDERS: I would also indicate to Your Honor --

THE COURT: Mr. Ibrahim, for the sake of the record, is showing him an accounting paper with a lot of numbers on it.

MR. IBRAHIM: Mr. Sanders took $91,000 back pay, according to your ruling, up to September 27, 1990. The tax expert put 120,000. He took what is in his interest, and did not take what is against his interest.

THE COURT: It is very hard for me to follow this without --

MR. IBRAHIM: The back pay received is $120,000 here, and the expert witness, he admitted 90 only.

THE COURT: Here's what we'll do, you sit down with your colleague.

MR. POWELL: Detail it both for the Mr. Sanders and the court consideration. I do agree that these things can not be just addressed verbally. You do need to see what we are relying upon.

THE COURT: This is the first time I am doing this. If you and Mr. Sanders can make some progress on the point, then we perhaps can resolve it, and, if not, you will

make an application to reopen the trial. You bring your expert back up and put him on the stand and he will testify and be subject to cross-examination, and we'll close the damages trial.

Isn't that the way to do this?

MR. IBRAHIM: Yes.

THE COURT: However apart are we on numbers?

MR. SANDERS: Substantially, Your Honor, because again the situation is that now Mr. Ibrahim has raised that the negative income tax payment is over $300,000, so the amount of damages in total would be over $600,000.

Now, I would also say that it is also interesting that numbers substantially change by them when they initially sent the proposed judgment to you. There was one figure when they sent the amended judgment, and there was a substantially different figure. So, again, there's a situation as time progresses, Mr. Ibrahim, pursuant to his lawsuit, continuously changes.

THE COURT: I understand, but his explanation for that is the law has changed and the numbers, therefore, have changed. If he's right or wrong, I can't begin to say. Let's see if his counsel can satisfy you at all and, if he can't, then he has to make an application to reopen the trial.

MR. IBRAHIM: A hundred percent right, Your Honor, I swear. I live 17 years to fight this case and I want to finish it.

THE COURT: Well, you and I are in agreement on that, Mr. Ibrahim, so do I.

What is the other case all about?

MR. MATHIEU: That has to do with the Department of Social Services, and it's a failure to promote case. There was -- about two years ago we answered a complaint filed, a summary judgment motion. Things were held in abeyance because we believed that the numbers would, in the outcome of this case, affect his damages.

MR. POWELL: And that was also -- that theory was also ascribed to by Magistrate Caden, who made the report and recommendation when there was a motion for summary judgment on the second case, and he essentially retained one of the -- he dismissed, for example, as against certain entities, retained just against the Department of Social Services, and also indicated that he felt that there would probably be renewal, and he wanted there to be some discovery, and he indicated that in the report.

Since that time, even before I again came into the picture, there were conferences, and then subsequent to that Mr. Mathieu and I have had some conferences where the magistrate had pretty much said why don't we wait until we get a judgment in this case to see whether there's any overlapping, with respect to the damages that Mr. Ibrahim -- I think the court had addressed that by saying that he had not mitigated and, therefore, the damages stopped as of the date of the offer of the new employment.

But Magistrate Caden still felt he wanted to have a judgment in affect. He did recommend that I amend the complaint to reflect the changes from the decision. I have

done that and given it to Mr. Mathieu just recently. I think it was hand-delivered on February 10th, asking him to consider it, and if what the magistrate has said. If he wouldn't accept the amendment, and I would have to make a motion before Your Honor, which we are prepared to do if that occurs.

We also have a status conference coming up later this month with Magistrate Caden on this matter as well, on the 24th.

THE COURT: All right. So here's the thing, do we have some time in about two weeks?

THE COURT CLERK: Yes.

THE COURT: From what I hear from you, we ought to continue the background of that matter until we get this resolved and see if you want to go forward with it. Is that what I'm hearing?

MR. POWELL: That's what pretty much -- I won't speak for Mr. Mathieu, that's what we all agreed should be.

THE COURT: Okay.

THE COURT CLERK: Monday, March 3rd.

THE COURT: See if your expert is available for Monday, March 3rd.

MR. POWELL: For a hearing, Your Honor?

THE COURT: If necessary.

MR. POWELL: If necessary, if we can't resolve this amongst ourselves.

THE COURT: And you got to put your position down so that we know what this hear is about. To just put a man on the stand and have him talk about numbers and codes, this won't be helpful. Mr. Sanders is entitled to know what the point is and arguments are before called upon to cross-examine, if necessary.

So you have two weeks now to get that done because on this date we'll conduct the damages hearing, make a finding and file a judgment.

THE COURT CLERK: 11:00 am.

THE COURT: 11:00, March 3rd.

MR. POWELL: Thank you, Your Honor.

MR. SANDERS: Thank you, Your Honor.

MR. MATHIEU: Thank you.